EDITOR'S NOTE

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No. 85-2064-CFH
Status: GRANTED

Title: James Greer, Warden, Petitioner
v.
Charles "Chuck" Miller

Docketed:
June 3, 1986

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Rotert, Mark L.

Counsel for respondent: Peterson, Gary R.

Entry	Date	Note	Proceedings and Orders
1	Jun 3 1986	G	Petition for writ of certiorari filed.
2	Jul 9 1986		DISTRIBUTED. September 29, 1986
4	Oct 3 1986		REDISTRIBUTED. October 10, 1986
6	Oct 14 1986	F	Response requested.
7	Nov 10 1986	X	Brief of respondent Charles "Chuck" Miller in opposition filed.
8	Nov 12 1986		REDISTRIBUTED. November 26, 1986
9	Nov 10 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
10	Dec 1 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Dec 1 1986		Petition GRANTED.
			**********
13	Jan 12 1987		Order extending time to file brief of petitioner on the merits until January 30, 1987.
14	Jan 16 1987		Joint appendix filed.
15	Jan 30 1987		Brief of petitioner Greer, Warden filed.
16	Feb 5 1987		Record filed.
17	Feb 5 1987		Certified copy of C. A. proceedings received.
18	Feb 10 1987		Record filed.
19	Feb 10 1987		Certified copy of original record, 1 box, received.
21	Feb 20 1987		Order extending time to file brief of respondent on the merits until March 16, 1987.
22	Mar 13 1987		Brief of respondent Charles "Chuck" Miller in opposition filed.
23	Mar 11 1987		SET FOR ARGUMENT. Monday, April 27, 1987. (3rd case).
24	Mar 16 1987		Brief amicus curiae of ACLU, et al. filed.
25	Mar 16 1987		Brief of respondent Charles "Chuck" Miller filed.
26	Mar 31 1987		CIRCULATED.
27	Apr 20 1987	X	Reply brief of petitioner Greer, Warden filed.
28	Apr 27 1987		ARGUED.

No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES GREER, Warden, Menard Correctional Center,

Petitioner,

vs.

UNITED STATES OF AMERICA ex rel. CHARLES "CHUCK" MILLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, when considering violations of *Doyle v. Ohio* in federal habeas corpus proceedings, the standard of review should be whether the error substantially affected the course of the trial rather than whether the error was harmless beyond a reasonable doubt.

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APPENDIX

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In The

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, *en banc*, is to be reported at *United States ex rel. Miller v. Greer*, ____ F.2d ____ (No. 84-2679, 7th Cir., 4-9-86). A copy of the opinion is attached to this petition as Appendix A. The opinion of the panel of the United States Court of Appeals for the Seventh Circuit is reported at *United States ex rel. Miller v. Greer*, 772 F.2d 293 (7th Cir., 1985). A copy of the opinion is attached to this petition as Appendix B. The order of the United States District Court is recorded as *United States ex rel. Miller v. Greer*, No. 83-3254 (C.D. Ill., 8-27-84). A copy of the order is attached to this petition as Appendix C.

The opinion of the Illinois Supreme Court is reported at *People v. Miller*, 96 Ill. 2d 385, 450 N.E.2d 322 (1983). A copy of the opinion is attached to this petition as Appendix D. The opinion of the Illinois Appellate Court is reported at *People v. Miller*, 104 Ill. App. 3d 57, 432 N.E. 2d 650 (4th Dist., 1982). A copy of the opinion is attached to this petition as Appendix E.

JURISDICTION

On April 9, 1986, the *en banc* court of appeals reversed the district court's judgment denying the writ of habeas corpus. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Offenses

Respondent, Charles Miller, was tried by jury and found guilty of murder, aggravated kidnapping, armed robbery and kidnapping. (R. Vol. VII, 232) The State requested a hearing on whether to impose the death penalty. (R. Vol. VII, 235) At the conclusion of the hearing, the jury recommended a sentence of imprisonment. (R. Vol. I, 509) Respondent was sentenced to concurrent terms of 80 years for murder, 30 years for aggravated kidnapping, and 7 years for robbery. (R. Vol. I, 609, Vol. XI, 42)

Randy Williams, an accomplice turned State's witness, testified that he, respondent and Butch Armstrong stood

Neil Gorsuch against the guard rail of a rural bridge and fired shotgun blasts into his head. (R. Vol. VI, 258-264) None of the three had ever seen Gorsuch before that night. (R. Vol. VI, 221).

The motive for the murder was unclear. Gorsuch allegedly touched Armstrong's leg. (R. Vol. I, 237; Vol. VI, 495) Armstrong perceived this as a homosexual advance and beat Gorsuch. (R. Vol. I, 237; Vol. VI, 224-225) Because Armstrong was on felony parole at the time, he may have killed Gorsuch to prevent Gorsuch from reporting the beating to the police. (R. Vol. I, 243-44; Vol. III, 21)

Williams testified that he shot Gorsuch because he was afraid that he would be killed by Armstrong if he refused. (R. Vol. VI, 262-63)

Respondent had no known motive to kill Gorsuch. Respondent was not present at the time of the touching or at the time of the beating. Armstrong and Williams picked up respondent from his home on the way to the site of the murder. (R. Vol. VI, 243-46) Respondent fired the first shot at Gorsuch. (R. Vol. VI, 260)

B. The *Doyle* Violation

Respondent was arrested the day after the killing. He was advised pursuant to *Miranda v. Arizona*, 384 U.S. 436, 467-473 (1966), and invoked his right to remain silent. (R. Vol. I, 556)

At trial, respondent presented an alibi defense. On cross-examination the prosecutor's first questions to respondent were:

Q: Mr. Miller, how old are you?

A: 23.

> Q: Why didn't you tell this story to anybody when you got arrested?
>
> Defense Counsel: Objection, your honor. May we approach the bench?

(R. Vol. VII, 108) The objection was sustained and the jury was instructed "to ignore that last question, for the time being." (R. Vol. VII, 109) Respondent never answered the question.

The prosecutor then conducted a lengthy cross-examination but did not raise the matter of respondent's silence again. In closing argument, neither party mentioned respondent's silence. Immediately before retiring to deliberate, the jury was instructed to disregard any questions to which objections had been sustained. (R.C. 368, 420)

C. State Court Appellate Review

Respondent appealed his convictions to the Illinois Appellate Court. That court found that the prosecution had improperly referred to respondent's post-*Miranda* silence. The court applied the *Chapman v. California*, 386 U.S. 18 (1967) standard for harmlessness which required that the error be harmless beyond a reasonable doubt. The court unanimously held that the error was cause for reversal. *People v. Miller*, 104 Ill. App. 3d 57, 432 N.E.2d 650 (4th Dist., 1982).

The State then appealed to the Illinois Supreme Court. That court also applied the *Chapman* standard, but found that the error was harmless beyond a reasonable doubt. One member of the court dissented from this opinion. *People v. Miller*, 96 Ill. 2d 385, 450 N.E.2d 322 (1983).

D. Federal Habeas Corpus Proceedings

Respondent then petitioned the federal district court for a writ of habeas corpus. That court agreed with the Illinois Supreme Court and held that the error was harmless beyond a reasonable doubt. *United States ex rel. Miller v. Greer*, No. 83-3254 (C.D. Ill., 8-27-84).

Respondent appealed to the United States Court of Appeals for the Seventh Circuit. That court applied the *Chapman* standard and the majority of a three member panel held the error justified issuance of the writ. One member dissented. *United States ex rel. Miller v. Greer*, 772 F.2d 293 (7th Cir., 1985).

Petitioner asked the Court of Appeals to rehear the case *en banc*. The request was granted. Petitioner argued that, when reviewing *Doyle* violations, the standard should be whether the error substantially affected the course of the trial rather than whether the error was harmless beyond a reasonable doubt.

The five member majority refused to apply the substantial influence standard and, applying *Chapman*, held that the error was cause for a new trial. *United States ex rel. Miller v. Greer*, ____ F.2d ____ (No. 84-2679, 7th Cir., 4-9-86). Four members of the court dissented. Three members found that the error was harmless beyond a reasonable doubt. *Id.* One member argued that the standard to be applied to *Doyle* violations should be whether the violation had a substantial influence on the course of the trial. *Id.*

Accordingly, the majority of the court of appeals *en banc* ordered that the writ should issue.

REASONS FOR GRANTING CERTIORARI

WHEN CONSIDERING VIOLATIONS OF *DOYLE v. OHIO* IN FEDERAL HABEAS CORPUS PROCEEDINGS, THE STANDARD OF REVIEW SHOULD BE WHETHER THE ERROR SUBSTANTIALLY AFFECTED THE COURSE OF THE TRIAL RATHER THAN WHETHER THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The question of the standard of habeas review for *Doyle v. Ohio*, 426 U.S. 610 (1976) violations is a novel one which this Court has never specifically addressed. The circuit courts have simply presumed that the *Chapman v. California*, 386 U.S. 18, 24 (1967), harmless beyond a reasonable doubt test, is the proper standard. However, this Court has recently suggested that *Chapman* may not be the correct test. In *Wainwright v. Greenfield*, 106 S.Ct. 634, 639 (1986), this Court said that *Doyle* is premised on the Fourteenth Amendment rather than the Fifth. This distinction is significant because in *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-643 (1974), this Court suggested that the standard of harmlessness could be affected by whether or not the error involved a specific provision of the Bill of Rights.[1] Since the right protected in *Doyle* is not premised on the Bill of Rights, a violation of that right should not be entitled to a standard of review as harsh as the harmless beyond a reasonable doubt test.

Moreover, Judge Easterbrook of the Seventh Circuit Court of Appeals has argued that *Doyle* violations should

[1] In *Donnelly*, a prosecutor's error in closing argument, which was obviously not a circumstance protected by the Bill of Rights, was reviewed by the standard of whether the remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. 416 U.S. at 643.

be reviewed by the *Kotteakos v. United States*, 382 U.S. 750, 765 (1946) standard of whether the error had a substantial influence on the course of the trial. *Phelps v. Duckworth*, 772 F.2d 1410, 1421-1422 (7th Cir. 1985) (*en banc*), (concurring opinion); *Miller v. Greer*, ____ F.2d ____ (No. 84-2679, 7th Cir., 4-9-86) (*en banc*), (dissenting opinion). Judge Easterbrook argued that, since *Doyle* was a prophylactic measure designed only to protect the integrity of another prophylactic measure, the *Miranda v. Arizona*, 384 U.S. 436, 467-473 (1966) decision, it was at least three times removed from the Constitution. Thus, violations of the protection provided by *Doyle* should not be entitled to review by the harmless beyond a reasonable doubt standard. *Phelps*, 772 F.2d at 1422; *Miller*, slip opinion at 20-25.

In the *Miller* dissent, Judge Easterbrook gives four additional reasons which support application of the *Kotteakos* substantial influence test when reviewing *Doyle* violations. (1) The case was before the court on a petition for writ of habeas corpus, which is collateral review; (2) the error could have been corrected at trial had the respondent made the attempt;[2] (3) the prosecutor's reference to respondent's silence was cut short so that the error was really prosecutorial misconduct rather than a violation of *Doyle*; and (4) since the State provided a remedy (the curative instruction), respondent should carry the burden of showing that the remedial device was insufficient to cure the error. *Miller*, slip opinion at 25-33. These reasons, when considered in conjunction with the premise that

[2] One of the reasons given for finding the error harmful in the instant case was the ambiguity of the curative instruction. The court admonished the jury to "ignore that last question for the time being." (R. Vol. VII, 109)

Doyle is a prophylactic measure not specified in the Bill of Rights, compel the conclusion that violations of *Doyle* are not entitled to the harmless beyond a reasonable standard of review.

In summary, this Court should grant certiorari to instruct the lower courts that the standard to be applied when reviewing *Doyle* violations in federal habeas corpus proceedings, is whether the error substantially affected the course of the trial rather than whether the error was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2679

UNITED STATES OF AMERICA ex rel.
CHARLES "CHUCK" MILLER,

Petitioner-Appellant,

v.

JAMES GREER, Warden, Menard Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 83-3254—**J. Waldo Ackerman**, *Judge.*

ARGUED FEBRUARY 5, 1986—DECIDED APRIL 9, 1986

Before CUMMINGS, *Chief Judge*, and BAUER, WOOD, CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, and RIPPLE, *Circuit Judges.*

FLAUM, *Circuit Judge*, with whom BAUER, CUDAHY, POSNER, and RIPPLE, *Circuit Judges*, join. Petitioner Charles Miller appeals the district court's denial of his petition for writ of habeas corpus, contending that his constitutional rights were violated when the prosecutor improperly commented on his post-arrest silence during his trial in state court for murder, kidnapping, and robbery. This court reversed the district court in a panel opinion issued August 27, 1985. Rehearing en banc was granted on November 14, 1985 and the original decision vacated. We reverse the district court's denial of the writ.

I.

This case involves the brutal kidnapping, murder, and robbery of Neil Gorsuch during the early morning hours of February 9, 1980, in Morgan County, Illinois. Miller was indicted for the crimes on February 11, 1980, along with Clarence Armstrong and Randy Williams. Williams entered into a plea agreement with the state whereby the murder, aggravated kidnapping, and robbery charges against him were dropped in exchange for his guilty plea to one count of kidnapping and his testimony in the separate trials of Miller and Armstrong.

Randy Williams testified at trial as follows: he, his brother Rick, and Armstrong met Gorsuch in a tavern on the evening of February 8. The four men left together at about 1:30 a.m. the following morning, Armstrong having offered to give Gorsuch a ride back to his motel. After taking Rick home, Williams started driving to Gorsuch's motel. En route, Armstrong began beating Gorsuch in the back seat. Armstrong then told Williams to drive to Williams's house, where Armstrong again beat Gorsuch and got Williams's twelve-gauge shotgun out of the bedroom. The three men then got back into the car and drove to the trailer home where Miller was staying. While Williams and Gorsuch waited in the car, Armstrong went in and talked briefly to Miller. Armstrong and Miller then left the trailer and got into the car. Williams drove to a bridge in an isolated rural area, where Armstrong removed Gorsuch from the car and stood him up against the bridge railing. Williams, Armstrong, and Miller then each shot Gorsuch once in the head with the shotgun, and Armstrong pushed the body over the railing into the creek below.

Charles Miller testified that Armstrong came to his trailer in the early morning hours of February 9 and said that he needed to talk to Miller because he and Williams had killed somebody. Miller went with Armstrong to Williams's house and talked to the two men for awhile. He and Williams then took Armstrong home and had breakfast at Dottie's Cafe, which was run by Williams's mother. After breakfast, Miller returned to the trailer. He and Williams were arrested that night at a gas station on their way home from a party.

Other witnesses testified that Gorsuch left the tavern on the morning of February 9 in the company of the two Williams brothers and Armstrong. The people in the trailer where Miller was staying that night testified that Armstrong arrived at the trailer during the early morning hours of February 9 (estimates varied from 4:15 a.m. to 6:30 a.m.) and left with Miller after a short conversation. Williams's mother testified that Williams and Miller arrived at her cafe for breakfast at approximately 6:15 a.m. Shotgun shells, other evidence found near the bridge, and the autopsy reports indicated that the murder had taken place essentially as Williams described.

After Miller testified, the prosecutor began his cross-examination by asking:

> PROSECUTOR: Mr Miller, how old are you?
>
> DEFENDANT: Twenty-three.
>
> PROSECUTOR: Why didn't you tell this story to anybody when you got arrested?

Defense counsel immediately objected and, out of the presence of the jury, asked for a mistrial. The judge denied the motion and instructed the jury to "ignore that last question for the time being." The judge did not further instruct the jury on the prosecutor's reference to Miller's post-arrest silence.

The jury found Miller guilty of robbery, kidnapping, aggravated kidnapping, and murder. He was found not guilty of armed robbery. Miller was sentenced to concurrent terms of eighty years for murder, thirty years for aggravated kidnapping, and seven years for robbery.[1]

---

[1] The trial court vacated Miller's kidnapping conviction because kidnapping is a lesser-included offense of aggravated kidnapping.

On direct appeal, a unanimous panel of the Illinois Appellate Court reversed Miller's conviction and remanded for a new trial. *People v. Miller*, 104 Ill. App. 3d 57, 432 N.E.2d 650 (1982). The appellate court held that the prosecutor's reference to Miller's post-arrest silence directly violated *Doyle v. Ohio*, 426 U.S. 610 (1976), and that the trial court's attempt to cure the error was insufficient. 104 Ill. App. 3d at 61, 432 N.E.2d at 653-54. The appellate court found that the evidence against Miller was not overwhelming:

> [T]here is corroboration for the testimony of the accomplice, Randy Williams. However, nothing except Williams' testimony directly links Miller with the crimes.
>
> . . .
>
> The trial was essentially a credibility contest between defendant Miller and Randy Williams. The reference to post-arrest silence cast aspersions on Miller's credibility and may have irreparably prejudiced him in the eyes of the jury. Thus, reversal is required.

Id. at 61, 432 N.E.2d at 654.

The Illinois Supreme Court granted leave to appeal and reversed the appellate court's decision. *People v. Miller*, 96 Ill. 2d 385, 450 N.E.2d 322 (1983). The majority held that although the prosecutor's comment violated *Doyle*, the error was harmless because the comment was a single, isolated reference during the course of a lengthy trial, because Randy Williams's testimony was corroborated in many respects, and because the jury was instructed to disregard the comment. *Id.* at 396, 450 N.E.2d at 327. In dissent, Justice Simon pointed out that accomplice testimony is inherently unreliable and that the judge's allegedly curative instruction was insufficient. *Id.* at 397-99, 450 N.E.2d at 328-29.

Charles Miller filed a petition for a writ of habeas corpus in the United States District Court on August 22, 1983, pursuant to 28 U.S.C. § 2254 (1982). On August 27, 1984, the district court entered an order granting the

state's motion for summary judgment and denying the petition for the writ. *United States ex rel. Miller v. Greer*, No. 83-3254 (C.D. Ill. Aug. 27, 1984). The district court essentially adopted the Illinois Supreme Court's analysis, holding that the state's violation of *Doyle* was harmless beyond a reasonable doubt.

II.

The Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610 (1976), that "the use for impeachment purposes of [a] petitioner['s] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Id.* at 619. The state's first argument in response to Miller's appeal is that, despite the fact that the Illinois Appellate Court, the Illinois Supreme Court, the United States District Court, and this court's original panel all held otherwise, there was no *Doyle* violation in this case.

Charles Miller was not given *Miranda* warnings when he and Williams were arrested at a gas station in the early morning hours of February 10, 1980, for unlawful use of weapons (a handgun was found under the seat of the car that they were driving). Later that day, Williams gave a formal statement to the police implicating himself, Armstrong, and Miller in Gorsuch's murder. Immediately following Williams's statement, at 2:57 p.m., Miller was given *Miranda* warnings and arrested for the murder, kidnapping, and robbery of Neil Gorsuch.

The state concedes that Miller was given *Miranda* warnings at the time of his arrest for the instant offenses and that any comment referring to his silence after that arrest would be improper. It nevertheless argues that the prosecutor's reference to Miller's post-arrest silence could be construed as referring to the period between Miller's arrest on the weapons charge, when no *Miranda* warnings were given, and his arrest on the murder charge and receipt of *Miranda* warnings later that afternoon, and that the prosecutor's comment therefore did not violate Miller's

due process rights. *See Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (not improper to comment on post-arrest silence in the absence of *Miranda* warnings, which affirmatively assure a defendant that he has the right to remain silent); *Feela v. Israel*, 727 F.2d 151, 157 (7th Cir. 1984) (same). The state asserts that it would have been natural for Miller to have attempted to exculpate himself from any involvement in the Gorsuch murder during the period following his initial arrest because he was arrested with Williams and knew of Williams's involvement in the crime.

We cannot agree with the respondent's contentions. Although the prosecutor's question may have been intended to refer in part to Miller's silence following his arrest on the weapons charge, it cannot seriously be maintained that the prosecutor intended no reference to Miller's silence after his arrest for Neil Gorsuch's murder. From the jury's standpoint, the only reasonable inference to be drawn from the prosecutor's question—"Why didn't you tell this story to anybody when you got arrested?"—is that Miller was silent at the time of his arrest for the offenses for which he was then on trial.

The respondent asserts that it would have been "natural" for Miller to attempt to exculpate himself when he was arrested on the weapons charge merely because he was with Randy Williams. Although Williams may already have been a suspect in the murder because he had been seen leaving the tavern with Gorsuch, Miller was never even implicated in the crime until Williams gave his formal statement to the police later that day. It is not in the least bit "natural" for a person to try to exculpate himself of a crime of which he has not been accused. Indeed, the statement—"I did not kill anybody"—upon being arrested for unlawful use of weapons, drunken driving, or running a red light, would tend only to inculpate, rather than exculpate, the arrestee.

We conclude, as did the courts before us, that Miller was advised of his right to remain silent for purposes of *Doyle* when he was given the *Miranda* warnings at the

time of his arrest for the offenses charged at trial. *See People v. Miller*, 96 Ill. 2d at 394, 450 N.E.2d at 326. The prosecutor's reference to Miller's silence at the time of his arrest therefore violated his constitutional right to a fair trial. *Id.*

III.

The conclusion that there was a *Doyle* violation in this case does not end the inquiry, however, since constitutional trial errors of this sort can in certain circumstances constitute harmless error. *See Chapman v. California*, 386 U.S. 18, 24 (1967). The Supreme Court has imposed on the government the burden of proving "beyond a reasonable doubt that the [constitutional] error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. The circuits universally apply this "harmless beyond a reasonable doubt" standard to *Doyle* violations. *See, e.g., United States v. Elkins*, 774 F.2d 530, 539 (1st Cir. 1985); *Hawkins v. LeFevre*, 758 F.2d 866, 877 (2d Cir. 1985); *United States v. Cummiskey*, 728 F.2d 200, 204 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1869 (1985); *Williams v. Zahradnick*, 632 F.2d 353, 360 (4th Cir. 1980); *Chapman v. United States*, 547 F.2d 1240, 1248 (5th Cir.), *cert. denied*, 431 U.S. 908 (1977); *Martin v. Foltz*, 773 F.2d 711, 715 (6th Cir. 1985); *United States v. Disbrow*, 768 F.2d 976, 980 (8th Cir. 1985); *United States v. Ortiz*, 776 F.2d 864, 865 (9th Cir. 1985); *United States v. Remigio*, 767 F.2d 730, 735 (10th Cir. 1985); *United States v. Ruz-Salazar*, 764 F.2d 1433, 1437 (11th Cir. 1985).

This circuit is no exception, *see, e.g., United States v. Shue*, 766 F.2d 1122, 1133 (7th Cir. 1985) (Wood, J.). In this circuit alone, however, the possibility has been raised that a less stringent harmless error standard may be appropriate to *Doyle* situations. Concurring opinions to our *en banc* decision in *Phelps v. Duckworth* addressed the issue, although the majority there expressly declined to reach it. 772 F.2d 1410, 1414 (7th Cir. 1985). Moreover, the state pressed this position during oral argument in

this case, as does Judge Easterbrook in his dissent. Proponents of the lesser standard make several arguments. First, they urge that the Supreme Court in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), adopted a two-level harmless error standard: the *Chapman* standard for direct violations of rights specifically enumerated in the Bill of Rights, and a standard requiring the defendant to demonstrate that the violation had a substantial influence on the trial for fourteenth amendment violations. As a variant of this position, it has been suggested that the latter standard is applicable because *Doyle* is not an innocence-protecting rule but, rather, a prophylactic rule designed only to buttress *Miranda*, another prophylactic doctrine. A third variant argues that, no matter what the standard applied to direct appeals of *Doyle* violations, constitutional rules are enforced less strictly on habeas corpus review.

Analysis of these arguments is aided by the Supreme Court's recent pronouncement in *Wainwright v. Greenfield*, 106 S.Ct. 634 (1986). There, in its review of a habeas petition, the Court affirmed the Eleventh Circuit's decision that *Doyle* is violated when a prosecutor uses post-*Miranda* warnings silence as evidence of sanity. Although the harmless error issue was not before the Court, *Greenfield* is particularly notable for its strong affirmation of *Doyle's* constitutional underpinnings and for the twice-mentioned assumption in Justice Rehnquist's concurrence that the *Chapman* standard applies to habeas review of *Doyle* violations. *See* Rehnquist, J., concurring (joined by Burger, C.J.). Guided by this and other precedent discussed below, we conclude that the "harmless beyond a reasonable doubt" standard remains the law to which we must adhere, and that the state's position and its variants are misguided.

First, a careful reading of *Donnelly* and other cases reveals that the Supreme Court does not vary the harmless error standard with the kind of constitutional right at issue. Rather, the Court prescribes one standard—the *Chapman* standard—for determining harmlessness in the context of constitutional trial error and another standard

for determining whether ordinarily nonconstitutional trial error, for example, prosecutorial misconduct, is so prejudicial as to rise to the level of a due process violation.[2] Once the trial error has been identified as one of constitutional magnitude, then the *Chapman* standard is applied to determine whether the conviction must be reversed. For a recent explanation of this distinction, *see United States v. Mazzone*, 782 F.2d 757, 763 (7th Cir. 1986) (Posner, J.). *See also United States v. Young*, 105 S.Ct. 1038, 1045 n.10 (1985).

Donnelly itself made clear this scheme, explaining that the habeas petitioner there could point to nothing in his trial that specifically violated the constitution, such as prosecutorial comments on his right to remain silent. 416 U.S. at 643. Instead, the petitioner complained of the prosecutor's expression of personal opinion as to guilt, an error that would not implicate the petitioner's fourteenth amendment right to due process unless it actually "infected the trial with unfairness." *Id.* Thus, the petitioner has an uphill battle when he seeks to establish general trial error as constitutional error. But where the violation at trial *is* one of constitutional magnitude, then the government bears the "more onerous" burden of *Chapman*. *See United States v. Lane*, 106 S.Ct. 725, 730 n.9 (1986) (Burger, C.J.) ("the standard for harmless-error analysis adopted in *Chapman* concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors adopted in *Kotteakos v. United*

[2] There may also be a different approach to constitutional errors that do not affect trials. The Supreme Court in *Morris v. Mathews*, 106 S.Ct. 1032 (1986), held that in the double jeopardy context, once a jeopardy-barred conviction is removed and a lesser-included offense conviction substituted, the defendant bears the burden of demonstrating that the jury would not have convicted him of the lesser-included offense. The majority in *Morris* stressed the distinction between double jeopardy cases and cases involving constitutional trial errors, stating that "this [*Morris*] is not a 'harmless error' case." *Id.* at 1037. Thus, the *Morris* approach does not pertain to our analysis.

States, 328 U.S. 750 (1946)"). In *United States v. Bagley*, the Court was urged to reverse automatically or apply the *Chapman* standard to the government's failure to disclose impeachment material to the defendant. 105 S. Ct. 3375 (1985). The Court explained that a threshold inquiry first had to be undertaken to determine whether the nondisclosure amounted to a constitutional violation: "such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." 105 S.Ct. at 3381. Justice Marshall argued in dissent that *any* suppression of impeachment evidence should be considered constitutional error and thus urged the Court to "apply our normal constitutional error test and reverse unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial." 105 S.Ct. at 3394-95 (Marshall, J.). The express underpinning of *Bagley* was *United States v. Agurs*, 427 U.S. 97, 108 (1976): "to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."

Thus, the Court to date never has differentiated for harmless error standard purposes between Bill of Rights and fourteenth amendment violations,[3] or between *Doyle* and other constitutional trial violations, or between direct and collateral review of constitutional violations. Indeed, the Court continues to manifest its complete adherence to a unitary standard of harmless error for constitutional trial violations. For example, the Court recently reaffirmed the constitutional/nonconstitutional distinction and the viability of *Chapman* as *the* analysis for constitutional trial errors, see the language from *Lane*, *supra* p. 9. Regarding *Doyle* specifically, its constitutional importance was reiterated by the Court in *Greenfield*. That opinion makes

[3] In any event, it may be inappropriate to do so since all Bill of Rights provisions are enforced against the states as fourteenth amendment rights.

clear that *Doyle* is not of "secondary" constitutional status and is not merely a rule designed to increase adherence to *Miranda*. Instead, the court emphasized that drawing attention to post-*Miranda* warnings silence is fundamentally unfair and constitutes a direct, wholly independent violation of the due process clause of the fourteenth amendment.[4] 106 S.Ct. at 638-39. *See, e.g., South Dakota v. Neville*, 459 U.S. 553, 565 (1983); *Fletcher v. Weir*, 455 U.S. 603, 604-05 (1982).

Finally, Justice Rehnquist's assumption in *Greenfield* that the *Chapman* standard would apply there, 106 S.Ct. at 641, 644, is an additional entry in a long list of evidence that leads to the conclusion that *Chapman* is the law for *Doyle* violations in the context of habeas review. Although *Stone v. Powell*, 428 U.S. 465 (1976), precluded collateral review of exclusionary rule claims litigated in state proceedings, we can find nothing to indicate that where collateral review is permitted, the Court has prescribed a different standard for determining harmlessness.[5] The *Stone* doctrine, moreover, depends on the peculiar nature of the exclusionary rule as a "judicially created remedy

[4] It may taint the truth-seeking process as well. Silence after a state authority has promised that any statement one makes may be used at trial surely has questionable probative value. The Supreme Court suggested as much in *United States v. Hale*, 422 U.S. 171, 180 (1975), and the difference in probative value between post-warnings silence and silence without warnings formed part of the Court's rationale in *Fletcher v. Weir* for holding that only post-warnings silence implicates *Doyle*. 455 U.S. 603, 604-06 (1982).

[5] Any confusion on this point may be engendered by a possible misreading of *Henderson v. Kibbe*, 431 U.S. 145 (1977). In *Henderson*, the Court reversed a grant of the writ because it found that the petitioner's due process rights had not been violated by deficient jury instructions. The Court noted that the petitioner's burden in making a collateral attack on constitutionality was greater than in seeking direct review, because the question on direct review in the state court was merely whether the instruction was "undesirable, erroneous, or even universally condemned." *Id.* at 154.

rather than a personal constitutional right," 428 U.S. at 495 n.37. In an exclusionary rule situation, the constitutional violation occurs pre-trial and the rule operates to discourage law enforcement officials from future infidelity to the constitutional strictures. *Id.* at 492. Thus, the Court reasonably could conduct a cost/benefit analysis and conclude that collateral review there is unnecessarily costly, since there is no "reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk" of overturning convictions in federal habeas proceedings. *Id.* at 493. By contrast, the violation at issue in a *Doyle* situation is constitutional and personal to the petitioner. It occurs when the post-warnings silence is used at trial, and it offends due process. It denies the petitioner a fair trial, unless, and only unless, it can be said that the petitioner beyond reasonable doubt would have been convicted in the absence of the violation. Unless we are to conduct our own cost/benefit analysis and declare habeas relief from constitutional violations a thing of the past, this inquiry remains our responsibility. Accordingly, the *Doyle* violation must be examined in the context of petitioner Miller's trial in order to determine whether it was harmless beyond a reasonable doubt.

IV.

The Illinois Supreme Court based its conclusion that the prosecutor's improper comment was harmless error on three factors: the comment was a single, isolated reference during the course of a lengthy trial, Williams's testimony was corroborated in many respects, and the trial judge gave a curative instruction. We cannot agree with the Illinois Supreme Court's reliance on these factors. Beginning with the court's observation that the prosecutor's improper comment was but a single, isolated reference to Miller's post-arrest silence during the course of a week-long trial, we believe that the timing of the comment overshadows its singularity. No matter how many days

a trial may have lasted or how many witnesses may have appeared, the jury will pay close attention when a defendant accused of crimes as horrible as these takes the stand. That attention undoubtedly is heightened when the prosecutor rises to attack the defendant's story on cross-examination. When one of the first questions from the prosecutor is "Why didn't you tell this story to anybody when you got arrested?", the comment cannot be so easily dismissed as a single, isolated reference.

Turning to the corroboration of Randy Williams's testimony, the bulk of the testimony and physical evidence cited by the Illinois Supreme Court corroborated portions of Randy Williams's testimony that Miller did not even dispute: (1) that Williams, his brother Rick, Armstrong, and Gorsuch left the tavern together at approximately 1:30 a.m. on the morning of February 9; (2) that Gorsuch was beaten and then killed on the bridge by several shotgun blasts to the head; (3) that Armstrong went to the trailer where Miller was staying sometime that morning, talked to him briefly, and then left with him; and (4) that Williams and Miller had breakfast together near daybreak that morning at Dottie's Cafe.

With regard to the crucial part of Williams's testimony—his assertion that Miller took part in the murder of Neil Gorsuch—there was no direct corroborative evidence[6] and Miller denied being present when the murder was com-

[6] Rick Williams testified that on the evening following Gorsuch's murder, Randy Williams and Miller told Rick that they had killed Gorsuch and that Rick should keep quiet about it if the police began asking questions. Miller denied being present when this conversation took place. At most, this testimony provides indirect evidence that Miller was involved in the murder. Moreover, Rick Williams knew at the time of his testimony that his brother Randy had been promised leniency in exchange for testifying at trial. Thus Rick's credibility is questionable, since his testimony in no way endangered his brother and in fact may have been helpful in making Randy's version of the murder more attractive to the state.

mitted. There was no reason to find Miller's testimony particularly incredible or Randy Williams's testimony particularly credible on this point, especially since accomplice testimony of this kind is inherently unreliable, often motivated by factors such as malice toward the accused and a promise of leniency or immunity.[7] In short, this evidence does not approach the overwhelming evidence necessary to overcome constitutional error such as a *Doyle* violation. *Compare United States v. Hasting*, 461 U.S. 499, 511-12 (1983) (finding harmless error where victims promptly picked the defendants out of a line-up, neutral witnesses corroborated critical aspects of the victims' testimony, property of the victims was found in one of the defendant's possession, and there was identification of the car used and one of the defendant's fingerprints); *Feela v. Israel*, 727 F.2d 151, 157 (7th Cir. 1984) (finding harmless error where defendant had an implausible alibi and was arrested near the scene of the robbery with the vest, gloves, and handgun used by the robber); *United States v. Wilkins*, 659 F.2d 769, 774 (7th Cir.) (finding harmless error where defendant was arrested in the getaway car with the stolen money and guns several blocks from the bank), *cert. denied*, 454 U.S. 1102 (1981). The crux of this trial was whether the jury believed the Williamses or believed Miller. The prosecutor's improper inquiry, magnified by coming at a time when the jury's attention was focused on Miller, cast substantial doubt on Miller's credibility. We simply cannot assume beyond a reasonable doubt that the prosecutor's comment had no effect on the jury's assessment of Miller's credibility, and hence on the jury's verdict. *See, e.g., Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985) (where case comes down to the word of

[7] Counsel for the state represented during oral argument that the state had agreed prior to Miller's trial to drop all charges against Williams except for kidnapping, in return for his testimony. After Miller's conviction, Williams was sentenced on the kidnapping charge to two years of probation. Miller and Armstrong each were sentenced to eighty years in prison.

defendant against the word of key prosecution witness, *Doyle* violation can never be harmless); *United States v. Harp*, 536 F.2d 601, 603 (5th Cir. 1976) (where *Doyle*-violative remark strikes at the "jugular" of defendant's story, error cannot be classified as harmless).

Finally, in regard to the allegedly curative instruction given by the trial judge, we believe that the judge's admonition to ignore the prosecutor's reference to Miller's post-arrest silence "for the time being" was simply too ambiguous in the setting of a clear-cut *Doyle* violation to cure the effect of the prosecutor's improper comment. The record reflects that the judge was apparently unaware that the prosecutor's question was a violation of *Doyle*. At the side bar conference following defense counsel's objection to the prosecutor's comment, the judge stated: "I will do some checking during the time he is on the witness stand on Cross Examination and if I find where he can, I will let him ask the question." Thus, the instruction that the judge gave to the jury reflected what he apparently was thinking at the time, which was that the jury might be able to consider the prosecutor's comment and the implications arising therefrom at some point in the future. Because of the important fourteenth amendment guarantees protected by *Doyle*, we hesitate to hold that anything other than a clear, immediate, and unambiguous cautionary instruction can be sufficient to cure a *Doyle* violation. *See United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1303 (7th Cir. 1985) (final jury instructions ordinarily not sufficient to cure constitutional errors). Even if we were willing to consider a flawed cautionary instruction sufficient under certain circumstances, we could not conclude that the *Doyle* violation in the circumstances of this case was rendered harmless by the trial judge's obscure instruction.

In sum, we hold that the state has not met its burden of proving that the prosecutor's clear violation of *Doyle* was harmless beyond a reasonable doubt. In reaching this conclusion, we are not unmindful of the appropriateness of deferring to the state courts' assessment of the impact

of prosecutorial error on state trials. However, we are respectfully unable to accept the Illinois Supreme Court's analysis in this case, although our conclusions track closely those of the unanimous Illinois Appellate Court. Because the crucial issue at trial was credibility, the *Doyle* violation went to the heart of the truth-seeking process. The evidence against Miller was not overwhelming, his story was not implausible, and the trial court's cautionary instruction was insufficient to cure the error. In these circumstances, we must conclude that it is not clear beyond a reasonable doubt that, absent the prosecutor's improper comment, the jury would have found Miller guilty of the crimes for which he was convicted.

V.

The district court's judgment denying a petition for a writ of habeas corpus is accordingly reversed, and the matter remanded with instructions to order Miller's release from custody unless the state retries him within the 120-day time limit.

CUMMINGS, *Chief Judge*, with whom WOOD and COFFEY, *Circuit Judges*, join, dissenting. I dissented from the panel opinion (reported in 772 F.2d 293) because of my agreement with the reasoning of the Illinois Supreme Court when in *People v. Miller*, 96 Ill. 2d 385 (1983), it disposed of Miller's appeal from the Appellate Court of Illinois. I still fully agree with the Illinois Supreme Court's rationale:

> Here, it is our view that, beyond a reasonable doubt, the prosecutor's improper inquiry did not affect the verdict. In addition to the fact that the jury was informed to disregard the question, it was but a single, isolated reference to defendant's post-arrest silence made during the course of a lengthy trial. Further, the evidence, as previously recited, was sufficient to prove defendant's guilt beyond a reasonable doubt. We do not consider this "a case in which, absent the constitutionally forbidden [inquiry], honest, fair-minded jurors might very well have brought in [a] not-guilty [verdict]." *Chapman v. California* (1967), 386 U.S. 18, 25-26, 17 L. Ed. 2d 705, 711, 87 S. Ct. 824, 829.

96 Ill. 2d at 396.

While the majority opinion here relies on the Supreme Court's most recent treatment of *Doyle v. Ohio*, 426 U.S. 610, in *Wainwright v. Greenfield*, 106 S. Ct. 634, the Florida attorney general did not claim in *Greenfield* that the prosecutor's comment on Greenfield's silence was harmless error. 106 S. Ct. at 640-641 n.13, 644. The majority opinion concludes here, like the concurring opinion in *Greenfield*, that a *Doyle* error is still to be judged by the "harmless beyond a reasonable doubt" standard.[1]

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[1] See *Cupp v. Naughten*, 414 U.S. 141; *Donnelly v. DeChristoforo*, 416 U.S. 637; *Chapman v. California*, 386 U.S. 18, 24.

While I also believe that the "harmless beyond a reasonable doubt" standard still governs *Doyle* violations, the district court and the Illinois Supreme Court rightly considered that under that standard this fifteen-second colloquy,[2] alleviated by the trial judge's immediately sustaining the defendant's objection and instructing the jury to ignore the prosecutor's improper question[3] and by a threshold jury instruction to disregard questions to which objections were sustained (Trial Court Record C368 and C420), did not affect the verdict. The district court's judgment should be affirmed.

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[2] District Court order reproduced in petitioner's App. A p. 3.

[3] The instruction was "to ignore the last question, for the time being" unless the judge's checking while Miller was on the witness stand on cross-examination showed that the prosecutor's question was permissible (petitioner's App. A p. 2). Since the judge did not so find, the instruction remained in effect and was augmented by the fourth instruction to the jury upon the completion of the closing arguments.

EASTERBROOK, *Circuit Judge*, dissenting. The majority identifies a violation of the principles of *Doyle v. Ohio*, 426 U.S. 610 (1976), and inquires whether this violation is harmless "beyond a reasonable doubt," the standard of *Chapman v. California*, 386 U.S. 18 (1967). It concludes that the error is not harmless under this exacting standard and holds that the writ of habeas corpus must issue. I do not quarrel with the majority's conclusion that there was a violation, which is not harmless if the *Chapman* standard governs.[1] But I disagree with the basis of the majority's holding—the conclusion that *Chapman* applies to all violations of the constitution. The court should apply the standard of *United States v. Lane*, 106 S. Ct. 725 (1986), and *Kotteakos v. United States*, 328 U.S. 750 (1946), under which a violation requires a new trial only if it "had substantial influence" on the course of the trial. See *Phelps v. Duckworth*, 772 F.2d 1410, 1421-22 (7th Cir. 1985) (en banc) (concurring opinion). This means "actual prejudice" (*Lane, supra*, 106 S. Ct. at 732), a significant likelihood of altering the verdict. Under that test the prosecutor's misconduct in this case is harmless.

The standard of "harmlessness" has never been a unitary one. It varies with the nature of the underlying right, the time of the violation, the tools available to correct

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[1] Even under *Chapman* there is a good argument that the error is harmless, as six Justices of the Supreme Court of Illinois held (see 97 Ill. 2d 385, 450 N.E.2d 322) and as Chief Judge Cummings concludes. The trial lasted nine days; the offending question was a brief interlude. The court sustained an objection to the question, and the prosecutor never got to argue to the jury the inference it should draw from silence. The court told the jury at the end of the case to ignore all questions to which objections had been sustained. Doubtless the judge would have been more explicit had Miller's counsel asked for more. Counsel did not ask the judge to elaborate, perhaps concluding that it would be counterproductive to focus the jury's attention on this. The evidence in this case did not admit of one conclusion only, but neither did the evidence in *Phelps v. Duckworth*, 772 F.2d 1410 (7th Cir 1985) (en banc), in which we found a similar frustrated prosecutorial effort to have been harmless.

the violation at trial, and the number of layers of review. (1) Constitutional rules that promote the accuracy of the truth-finding process, that protect the innocent, are enforced strictly. "Prophylactic" rules designed to achieve collateral objectives need not be enforced in every case or at any cost. *Doyle* is a prophylactic rather than innocence-protecting rule. (2) Constitutional rules are enforced more strictly on direct review than on collateral review. Some rules are not enforced at all on collateral review. This case is a collateral attack, and the state courts gave full and fair consideration to Miller's constitutional claim. (3) When the violation is one that may be prevented or corrected at trial, but because of the neglect of defense counsel is not, courts are less willing to enforce the rule strictly. Strict enforcement weakens the incentives to do things right the first time. The *Doyle* error in this case could have been corrected at trial more fully than it was, had Miller's counsel but asked. (4) When the violation is prosecutorial misconduct during the trial, collateral review is limited to determining whether the trial is fundamentally fair. The prosecutor's effort to use Miller's silence was cut short by the judge, and we are left with prosecutorial misconduct rather than a completed *Doyle* violation. We are concerned with the adequacy of the remedy, not the identification of the wrong. All of these considerations suggest that *Chapman* is the wrong standard, for it stacks the deck against the verdict of the jury. I elaborate below on each of the four.

1. *Doyle* holds that the due process clause of the fourteenth amendment forbids the use as evidence of a suspect's silence after he has received the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). See *Wainwright v. Greenfield*, 106 S. Ct. 634 (1986). This is not because silence will mislead the jury or cause it to convict an innocent person. To the contrary, innocent people with plausible explanations tend to give them promptly, in order to achieve release. Silence at the time of arrest, followed by an exculpatory story at trial, is evidence of guilt. *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v.*

Anderson, 447 U.S. 231 (1980). Cf. *South Dakota v. Neville*, 459 U.S. 553 (1983). Some language of *Doyle* suggests that silence is "insolubly ambiguous," but cases such as *Fletcher* and *Jenkins*, which allow the jury to hear evidence of silence that precedes *Miranda* warnings, abandon this strand of *Doyle*'s reasoning. See also *Greenfield*, *supra*, 106 S. Ct. at 639 n.6, 640 & n.12.

The rule of *Doyle* therefore rests exclusively on the vice of the double-cross. Defendants ought not to be bushwhacked if they rely on the advice implicit in *Miranda* warnings that the exercise of the right to remain silent will not come back to haunt them. *See Greenfield*, *supra*, 106 S. Ct. at 639-41; *Dean v. Young*, 777 F.2d 1239, 1241-42 (7th Cir. 1985). *Miranda* warnings are not parts of the constitution. They are designed to reduce the likelihood of subtle coercion of people in custody. *Oregon v. Elstad*, 105 S. Ct. 1285, 1291-93 (1985); *Michigan v. Tucker*, 417 U.S. 433, 442-46 (1974). *Doyle* is therefore a prophylactic rule designed to increase the efficacy of another prophylactic rule. It has nothing to do with the defendant's guilt and everything to do with insisting that the government play straight with those it prosecutes.[2]

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[2] "Playing straight" is a valuable objective, but it does not always prohibit a change of heart. Consider *Mabry v. Johnson*, 104 S. Ct. 2543 (1984), holding that a prosecutor may withdraw an offer of an advantageous plea bargain. Consider the holding that a confession obtained after the deceit of a suspect's lawyer is nonetheless admissible. *Moran v. Burbine*, 54 U.S.L.W. 4265, 4268, 4270 (U.S. Mar. 10, 1986). Or consider the many defendants prosecuted for carrying out a President's instructions. See the three distinct positions expressed in *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976). The legal system has never tried to make all promises of governmental agents perfectly believable or enforceable. E.g., *Heckler v. Community Health Services of Crawford County, Inc.*, 104 S. Ct. 2218 (1984); *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. Medico Industries, Inc.*, No. 85-1885 (7th Cir. Feb. 27, 1986), slip op. 8-9. The questions are how much enforcement, at what cost, for whose benefit? But I need not pursue the matter.

Because a violation of the rule of *Doyle* does not threaten the conviction of an innocent person, it is not essential to achieve perfect compliance. New trials are costly. They take the time courts and prosecutors could devote to affording first trials to other people. They increase the risk of error; trials long after the event, when memories have faded, are less likely to be accurate. And no one can guarantee that the second trial will be better than the first. There will be new opportunities for new errors, which may be as bad as the error in Miller's trial. The enforcement of prophylactic rules is a matter of costs and benefits. Such rules should be enforced only so long as the benefits exceed the costs. See Thomas W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U. Chi. L. Rev. 1, 53 (1985).

The two best-known prophylactic rules of the criminal law offer examples in abundance. The exclusionary rule under the fourth amendment and *Miranda* are both prophylactic rules, a "constitutional common law." Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975); Merrill, *supra*, 52 U. Chi. L. Rev. at 54-59. The use of illegally seized evidence is not itself a violation of the constitution and does not increase the risk of convicting the innocent. The exclusionary rule is designed to influence the conduct of police by denying them some of the benefits of their misconduct. Yet because at some point the costs of influencing the police in this way begin to exceed the marginal benefits, the Court has given the exclusionary rule less than its largest possible scope. See *United States v. Leon*, 104 S. Ct. 3405, 3418-22 (1984) (discussing both the nature and the rationale of the limits on enforcement). The rule prevents the government from using most (though not all) illegally seized evidence in the prosecutor's case in chief against the person whose privacy has been invaded, but it does not prevent the use of such evidence during cross-examination to impeach exculpatory testimony. Exclusion in such circumstances would simply offer shelter for perjury without significantly increasing the deterrent value of the rule. *United States v. Havens*, 446 U.S. 620 (1980).

Cases in the *Miranda* line also balance the gains from more rigorous enforcement against the costs. This has led to holdings that allow substantial use of the "fruits" of violations of *Miranda* (see *Elstad* and *Tucker*, *supra*) and that allow statements obtained in violation of *Miranda* to be used to impeach defendants who proclaim their innocence on the stand. *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). See also *New York v. Quarles*, 104 S. Ct. 2626 (1984) (statements obtained in violation of *Miranda* may be used when the "public safety" made it advisable for the police to disregard *Miranda*). Even cases dealing with evidence obtained in violation of the sixth amendment's right to counsel explicitly balance costs and benefits. *Maine v. Moulton*, 106 S. Ct. 477, 489-90 (1985).

Selecting a standard for assessing harmless error, no less than deciding when the prosecutor can use evidence the constitution says he should not have at all, requires an assessment of the marginal benefits and costs of additional enforcement. See *United States v. Mechanik*, 106 S. Ct. 938 (1986), in which the court uses just such an analysis to select a harmless error rule for violation of the rules concerning conduct before a grand jury. How much enforcement of the rule of *Doyle* is enough? *Doyle* is a descendent of *Miranda*, which suggests that perfect enforcement is not to be achieved at great cost. It is not concerned with protecting the innocent. The difference between a *Chapman* standard of review and a *Kotteakos* standard is not likely to weaken the effective enforcement of *Doyle*; no matter what standard of harmless error a court uses, the substantive rule informs judges how they must respond to the prosecutors' efforts and informs prosecutors that an effort to draw the jury's attention to the defendant's silence reduces the chance of conviction. These two messages, which are unaffected by the selection of a standard of harmless error, are the principal advantages of the rule. When the rule is as far removed from pro-

tecting the innocent as is *Doyle*, there is no need for the strict enforcement that the *Chapman* standard creates.

Indeed, the application of *Doyle* when the prosecutor uses the defendant's silence to impeach his exculpatory testimony (as the prosecutor did in Miller's trial) is anomalous. *Harris* and *Hass* hold that evidence obtained in violation of *Miranda* may be used to impeach, lest the defendant conclude that perjury will go unpunished. A use of silence condemned by *Doyle*, as another way to violate *Miranda*, should be treated the same way. Now *Doyle* itself involved silence used to impeach, but as I have explained *Doyle* initially rested on two lines of argument: the vice of prosecutorial contradiction and the "insoluble ambiguity" of silence. The latter stand suggested that *Doyle* protected rather than undermined the search for truth. This line of justification was abandoned in *Greenfield*, *Jenkins*, and *Fletcher*. The only case other than *Doyle* in which the Supreme Court has held that evidence of silence at the time of arrest must be excluded is *Greenfield*. In *Greenfield* the prosecutor used the silence as part of the state's case in chief. The Court then added this suggestive language: "At the outset, we note that, in this case, unlike *Doyle* and its progeny, the silence was used as affirmative proof in the case in chief, not as impeachment", to which it added this footnote: "The constitutional violation [in *Greenfield*] thus might be especially egregious because, unlike *Doyle*, there was no risk 'that exclusion of the evidence [would] merely provide a shield for perjury.' 426 U.S., at 626 (STEVENS, J., dissenting)." 106 S. Ct. at 639 & n.8. This may be too thin a foundation on which to build a conclusion that the prosecutor may ask the sort of question that the prosecutor did in this case. At a minimum, however, it shows that some violations of *Doyle* are more serious than others.

The sort of violation in this case is among the least serious, not only because it occurred during cross-examination but also because the court sustained an objection, on which more below. The less serious the offense, the less the state must do to rectify things. All of this calls for a

standard of harmless error more tolerant than that of *Chapman*. The Supreme Court has never discussed the standard of harmless error that applies to a violation of *Doyle*'s rule.[3] The choice is ours to make, and we should make it with reference to the kind of rule *Doyle* is and the costs and benefits of stricter enforcement, not by a mechanical invocation of *Chapman*.

2. This is a collateral attack on a criminal judgment. The comment on Miller's silence may have violated the constitution, but it takes a stretch to say that Miller's "custody" violates the constitution, which is the standard of 28 U.S.C. §2254(a). Not all violations of the constitution turn the resulting "custody" into a violation. *Stone v. Powell*, 428 U.S. 465 (1976), holds that violations of the fourth amendment do not permit a court to set aside the conviction under §2254(a) unless the state has failed to supply a full and fair opportunity for adjudicating the claim of violation. If the state supplies the necessary process, that vindicates the principles underlying the exclusionary rule; there is no need for the more complete protection that collateral review would produce.

This restriction of collateral review is but another demonstration that there can be too much of a good thing. It is costly to enforce any constitutional rule, and the "full treatment" should be reserved for rules designed to pro-

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[3] The parties in *Greenfield* did not present any issue concerning harmless error. 106 S. Ct. at 640 n.13. None of the earlier cases in this line discusses the question. Justice Rehnquist, concurring in *Greenfield*, observed that "the State does not argue here that any error was harmless beyond a reasonable doubt", 106 S. Ct. at 641, and went on to volunteer that even though the prosecutor argued inferences from silence during his closing argument (which did not happen here) "the brevity of the prosecutor's comment, at least suggests that the error was harmless beyond a reasonable doubt", 106 S. Ct. at 644. It is fanciful to find in this aside a conclusion that "reasonable doubt" is the *right* standard to use. The parties had not argued *any* standard of harmless error, and perforce they had not debated (and Justice Rehnquist had not focused attention on) *which* standard is the right one.

tect the innocent from improper conviction. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). See also Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). If state courts rigorously enforce a constitutional rule, that should be sufficient without the need for a second tier of review—certainly so if the rule is unrelated to the proper ascertainment of guilt. A federal court properly may insist that the state offer a full and fair opportunity to litigate. If the state does this the grant of release on collateral attack is more likely to come as a stroke of lightning (and so not influence state policy), or even to reverse a correct decision of the state court, than to be an essential prop under the constitutional right. Cf. *Vasquez v. Hillery*, 106 S. Ct. 617 (1986), at 625 (O'Connor, J., concurring), 628-34 (Powell, J., dissenting).

The Court has yet to decide whether *Stone v. Powell* applies to cases in the *Miranda* sequence. See *Nix v. Williams*, 104 S. Ct. 2501, 2512 n.7 (1984). So there is no simple answer to the question whether *Doyle*, a derivative, should be enforced on collateral attack.[4] We cannot answer this by pointing out, as the majority observes, that a *Doyle* violation "is constitutional and personal to the petitioner." Slip op. 14. Violations of the fourth amendment, too, are constitutional wrongs, and unless the wrong was "personal to" the defendant, the exclusionary rule does not apply even on direct review. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). The question is one of remedies on collateral attack, not of who was injured by the violation. But we need not pose the question as a choice between nonenforcement and full enforcement (meaning application of the *Chapman* standard). There is a middle ground. Some rights are enforceable on collateral attack, but only if the violation and injury are especially severe.

[4] Our court has held that *Doyle* and *Miranda* claims will be entertained on collateral attack. *White v. Finkbeiner*, 687 F.2d 885 (7th Cir. 1982) *vacated on other grounds*, 104 S. Ct. 1433 (1984). See also *Morgan v. Hall*, 569 F.2d 1161, 1168-69 (1st Cir. 1978).

For example, a violation of Fed. R. Crim. P. 11, which establishes procedures for taking guilty pleas, is enforceable on direct appeal by almost automatic reversal. *McCarthy v. United States*, 394 U.S. 459 (1969). On collateral attack, however, Rule 11 is enforceable only to the extent that the disregard of its provisions makes the proceedings fundamentally unfair. *United States v. Timmreck*, 441 U.S. 780 (1979). The difference is not attributable to the nonconstitutional status of Rule 11, for the Rule is a "law," and the pertinent statute, 28 U.S.C. §2255, allows collateral attack on the ground that a person is in custody "in violation of the Constitution or laws of the United States". See *Davis v. United States*, 417 U.S. 333 (1974). The change in the standard of review instead rests on the conclusion that for Rule 11, as for many other things, one round of review is sufficient unless something has gone very wrong indeed. See *Hill v. United States*, 368 U.S. 424, 428 (1962); *Sunal v. Large*, 332 U.S. 174 (1947). The same may be said for review of state convictions. See *Henderson v. Kibbe*, 431 U.S. 145, 154 & n.13 (1977), which holds that only in the rarest of cases will an instruction to which no objection was made at trial support collateral attack, even though the same instruction might have been "plain error" on direct appeal. All of these distinctions implement the principle that more enforcement of constitutional rights is not always required. If *Doyle* errors may be raised on collateral attack at all, "enough" enforcement will be achieved by application of the *Kotteakos* standard.

Chapman itself was a direct appeal, and the underlying right was designed to prevent juries from drawing unjustified inferences of guilt from the invocation of the privilege against self-incrimination. The Supreme Court has never explicitly considered when the *Chapman* standard should be applied in cases that are marginally (if at all) appropriate for collateral review. Cases such as *Henderson v. Kibbe* support the use of a graduated standard of review, and we ought not await a formal command from the Supreme Court that graduation is the norm.

3. One trial should be enough. In order to make one trial sufficient, it is necessary to ensure that counsel have the right incentives to marshall their resources for a single, correct presentation. It is also necessary to ensure that if something should go wrong, counsel have reason to correct whatever is correctable rather than sit by and store up error. Contemporaneous objection rules, and the forfeiture of collateral attack in the absence of such objections, help induce counsel to take care at trial. See *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983) (en banc).

The fact that some errors can be prevented or cured during the trial has led not only to preclusion of review, as in *Sykes*, but also to redefinitions of the right. We say that the defendant has a right to exclude hearsay if he objects, not that any use of hearsay is error. This is so for constitutional rights as well. The defendant starts with a presumption of innocence, and the Court has held that this implies a right not to be tried in jail garb. *Estelle v. Williams*, 425 U.S. 501 (1976). The defendant must assert this right to claim it, however; if he does not object, he may not later complain. The rationale for this, and for other cases insisting that the defendant take an active part in the vindication of his rights, is that every participant in the trial should help to reduce the incidence of error. Errors that affect the operation of the trial may and should be prevented or cured; there is joint responsibility.

True, counsel for the defendant may be snoozing. But drowsiness is yet another preventable problem, and the errors of counsel will be overlooked unless they were so substantial that they probably change the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill v. Lockhart*, 106 S. Ct. 366, 369 (1985). The Court treats the effect of error on the trial as part of the definition of the right, because perfect representation is unlikely and it would be too costly to keep rerunning trials until things finally were done at a very high level of care. *Chapman*

vanishes as a standard in ineffective assistance cases. Gross errors of counsel will not lead to relief, even though a court could not find the error harmless beyond a reasonable doubt.

Where does this lead us? It means that errors within the power of counsel to correct at trial should not be assessed under the *Chapman* standard. Errors counsel should correct, counsel must correct. If counsel fails to do what is necessary (say, to object to the use of jail garb), that diminishes or eliminates review of the mistake. The case transmutes to an inquiry into the overall efficacy of counsel. If this is an isolated problem, there will be no relief; if counsel was seriously deficient and this calls into question the accuracy of the verdict, then there may be relief. It is silly to review each correctable error under the stringent *Chapman* standard and yet to review counsel's failure to prevent or correct these errors under a standard even looser than that of *Kotteakos*.

Miller's counsel could not have prevented the prosecutor's initial question, but counsel could have done more to deal with that question. Counsel objected; the court sustained the objection; that was the end. After discussing matters with counsel, the court told the jury to "ignore that last question for the time being." The majority finds this "too ambiguous" (slip op. 17) to overcome the implication in the prosecutor's sally. When *was* the jury to consider the question? During deliberations? The majority says that only "a clear, immediate, and unambiguous cautionary instruction can be sufficient to cure a *Doyle* violation." *Ibid.*

But a paltry or confusing instruction to the jury may have been what Miller's lawyer wanted. He could have asked for a stronger instruction during the conference held before the court gave this feeble one; he did not. Counsel could have asked for more, at once; he did not. Counsel could have asked for more when the judge gave the instructions at the end of the case; he did not. Counsel could have argued the point during his own closing argument;

he did not. All of these courses carry risks. Perhaps Miller's counsel thought that the prosecutor's abortive inquiry had not affected the jury. In that event it may have been sound strategy to leave things without further comment. Counsel may have concluded that the more the judge said, the more the jury would think about the fact that Miller was silent when arrested. Cf. *Lakeside v. Oregon*, 435 U.S. 333, 345-48 (1978) (Stevens, J., dissenting). Perhaps the risks of correction are so high that we should deem the judge's curative instruction irrelevant. But if cure is possible, cf. *Parker v. Randolph*, 442 U.S. 62, 69-75 (1979), then counsel's performance matters.

If counsel made a strategic decision not to ask the judge to give the sort of instruction the majority says was missing—to tell the jury that Miller had a right to remain silent and that the jury should not infer anything from the exercise of that right—then there is no basis for setting aside the conviction. A federal court ought not insist that the judge give instructions that defense counsel did not want. If, on the other hand, Miller's lawyer was asleep on his feet and did not ask for an instruction or clarification that would have helped his client, then this case should be assessed under the standards of *Strickland*, and the verdict should be preserved unless Miller shows that his counsel's neglect likely affected the outcome. Whether counsel was awake or asleep, tactical genius or blunderer, there is no reason to apply the standard of *Chapman* to the failure of counsel to ask (or the judge to volunteer) a better curative instruction.

4. The problem in Miller's case is one of prosecutorial misconduct, not judicial error. The prosecutor set off on a forbidden path. Before he could get past the first question, he was cut off by the judge, who correctly sustained an objection. If the court had allowed the questioning to continue or had allowed the prosecutor to argue to the jury that it should infer guilt from silence, we would have a completed violation, as there was a completed violation in *Chapman*.

The Court assesses prosecutorial misconduct under standards less stringent than that of *Chapman*. For example, in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), the prosecutor offered a personal opinion that the defendant was guilty and insinuated that defense counsel were seeking a conviction on reduced charges rather than an acquittal. This was serious misconduct, yet the Court held that the misconduct could support relief on collateral attack only if it so undercut the fairness of the entire trial that the trial violated the due process clause. Similarly, in *United States v. Young*, 105 S. Ct. 1038 (1985), a case on direct appeal, the Court applied the *Kotteakos* standard to prosecutorial misconduct in closing argument.

It could be said that these cases simply exclude particular instances of prosecutorial misconduct from the category of "violations of due process" and therefore do not affect the harmless error rule that applies to "real" violations. Perhaps so, as the majority concludes, although this is an artificial distinction. There is no analytical difference between saying "prosecutorial misconduct does not violate the due process clause unless it is sufficient to call for a new trial under *Kotteakos*" and saying "prosecutorial misconduct is fundamentally unfair and violates the due process clause, but it leads to a new trial only if it meets the standards of *Kotteakos*."

At all events, the argument that there is a clear separation between the definition of "unconstitutional misconduct" and the selection of the standard of review no longer carries the day. *United States v. Bagley*, 105 S. Ct. 3375 (1985), is a good example. The constitution requires the prosecutor to deliver material, exculpatory evidence to the defense. This is a duty; it does not depend on the prosecutor's state of mind. *United States v. Agurs*, 427 U.S. 97, 110 (1976). One could say that if the prosecutor violates this duty, then the conviction must be set aside unless the violation is harmless under *Chapman*. The Court has taken a different approach. Unless the prosecutor suborns perjury or refuses to supply exculpatory material that he knows is material, the conviction will be

sustained unless the defendant shows that the withheld information "undermines confidence in the outcome of the trial." *Bagley*, *supra*, 105 S. Ct. at 3381. Here we have a case of constitutional error[5]—more, constitutional error that could lead to the conviction of an innocent person—in which the Court puts on the defendant the burden of showing a probable effect on the outcome. This is review under a standard even less searching than *Kotteakos*, which assigns the burden to the prosecutor. *Bagley* merges the standard of review with the definition of the violation. So *Chapman* does not apply to all violations of the constitution.[6] It never did, and when the violation is prosecutorial misconduct, the Court is apt to apply an exceptionally loose standard of error.

5. All of this is reinforced by the fact that we must assess the state court's selection of a remedy for the wrong done to Miller. The state court gave a curative instruction. *Morris v. Mathews*, 106 S. Ct. 1032 (1986), suggests that the *Chapman* standard does not apply to disputes about the adequacy of remedies. *Morris* held that a court may cure a violation of the double jeopardy clause by substituting a conviction on an offense not barred by the clause, unless "the defendant shows a reliable inference of prej-

[5] The majority properly points out that *Bagley* said that "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." 105 S. Ct. at 3381. This merges the standard of harmless error into the definition of the violation. But other passages in *Bagley*—and the unanimous judgment of the chain of cases leading to *Bagley*—show that the Court treated any withholding as a "violation" without regard to the effect on fairness of the trial. Material exclupatory evidence must be disclosed because it might affect the outcome; the failure to disclose leads to reversal only if the fears have been realized. For this reason *Donnelly*, *supra*, distinguished the misconduct at issue there from the constitutional violation of withholding material exculpatory evidence.

[6] The Justices who dissented in *Bagley* argued that the Court should apply the *Chapman* standard. See 105 S. Ct. at 3391, 3395 (Marshall, J., joined by Brennan, J.).

udice." 106 S. Ct. at 1038. Four Justices would have used the *Chapman* standard, see *id.* at 1040-43 (Blackmun & Powell, JJ., concurring), 1044 (Brennan, J., dissenting), 1044-45 (Marshall, J., dissenting). *Morris* presented a question about how to cope with a constitutional error. The state coped by substituting a conviction on a lesser crime. The Court held it appropriate to require the defendant to show that the state's remedial device was insufficent to cure the constitutional error. This is not *Chapman*'s allocation of burdens. Perhaps *Morris* is limited to double jeopardy cases, but it could also be read to establish a general rule that the defendant must bear the burden of showing that despite the state's remedial device "the result of the proceeding probably would have been different" (*id.* at 4218) had there been no error. This fact-bound inquiry is an appropriate subject of deference under 28 U.S.C. §2254(d), albeit not preclusion. Cf. *Miller v. Fenton*, 106 S. Ct. 445 (1985).

I recognize that all of this has the makings of a bad stew. A cup of analogy to the exclusionary rule, four oz. of *Harris v. New York*, a slice of *Stone v. Powell*, a dollop of *Wainwright v. Sykes*, all seasoned by *Donnelly v. DeChristoforo* and *Strickland v. Washington*. Why scramble due process, the fourth amendment, restrictions on the scope of the substantive rule, preclusion of review, ineffective assistance of counsel, and other doctrines? Why not keep things straight?

It is tempting to sort these cases into little boxes and dismiss each as irrelevant to *Chapman*. But these principles are not so easy to confine. *Bagley*, a prosecutorial misconduct case, adopts the standard of *Strickland v. Washington*, an assistance of counsel case, which was in turn influenced by *Wainwright v. Sykes*, a forfeiture case. *Morris* merges questions of error with questions of remedy. These cases all reflect an underlying concern that collateral review of criminal convictions is very costly, a conclusion that the search for perfect justice must stop

well short. The standards for determining harmless error, just like the rules of forfeiture and the scope of the exclusionary rule, must be based on an appreciation of the benefits and costs of "better" enforcement of the substantive rules of law.

It is both tempting and wrong to treat "error" as a dichotomous phenomenon, as a matter of yes or no. There is error or not; the kind of error is reviewable on collateral review or not; this claim of error was forfeited or not; the error is harmless beyond a reasonable doubt or not; so the chain of questions and answers goes. Yet the definition of error, the scope of review on collateral attack, the circumstances under which review is forfeited, and the appropriate standard of harmless error have common influences. It is better to consider all of these together—however untidy the result may be—than to enforce an artificial separation. The definition of error, the scope of review, and the standard for assessing harmlessness all have shadings rather than simple, dichotomous answers.

The treatment of such questions as binary may produce unpleasant results. A court convinced that certain constitutional rights are not all that important may be tempted to cut down the scope of the right or to preclude review altogether, if these are the only alternatives to review under the *Chapman* standard. Alterations in the rules for determining harmless error may permit a court to enforce the rules of forfeiture less harshly. The interactions work in many directions.

Still, what conclusion comes from all of this? That *Doyle* should not be enforced on collateral review? That the standards of harmless error should differ on direct and collateral review? That the defendant must show that the prosecutor's misconduct probably changed the result of the trial? That *Kotteakos* is the right standard of harmless error? None of these flows ineluctably from the discussion. But I also need not choose. The majority applies the most stringent standard (*Chapman*), on collateral review, to the

prosecutor's foiled effort to violate a prophylactic rule. We needn't know the right analysis to know that *Chapman* should not be used. The application of the *Kotteakos* standard here yields a conclusion that the judgment of the state court should stand. It is neither wise nor necessary for a federal court to review with greater rigor the state's decision that the violation of the rule of *Doyle* in this case was harmless.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES of America ex rel. Charles "Chuck" MILLER, Petitioner-Appellant,

v.

James GREER, Warden, Menard Correctional Center, Respondent-Appellee.

No. 84-2679.

United States Court of Appeals, Seventh Circuit.

Argued April 11, 1985.

Decided Aug. 27, 1985.

Rehearing En Banc Granted Nov. 14, 1985.*

Before CUMMINGS, Chief Judge, FLAUM, Circuit Judge, and PECK, Senior Circuit Judge.

FLAUM, Circuit Judge.

Petitioner Charles Miller appeals the denial of his petition for a writ of habeas corpus, contending that his constitutional rights were violated when the prosecutor improperly commented on his post-arrest silence during his trial in state court for murder, kidnapping, and robbery. We reverse the district court's denial of the writ.

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* Opinion and judgment vacated.

I.

This case involves the brutal kidnapping, murder, and robbery of Neil Gorsuch during the early morning hours of February 9, 1980, in Morgan County, Illinois. Petitioner was indicted for the crimes on February 11, 1980, along with Clarence "Butch" Armstrong and Randy Williams. Williams entered into a plea agreement with the state whereby the murder, aggravated kidnapping, and robbery charges against him were dropped in exchange for his guilty plea to one count of kidnapping and his testimony in the separate trials of petitioner and Armstrong.

Randy Williams testified at trial as follows: he, his brother Rick, and Armstrong met Gorsuch in a tavern on the evening of February 8. The four men left together at about 1:30 a.m. the following morning, Armstrong having offered to give Gorsuch a ride back to his motel. After taking Rick home, Williams started driving to Gorsuch's motel. En route, Armstrong began beating Gorsuch in the back seat. Armstrong then told Williams to drive to Williams's house, where Armstrong again beat Gorsuch and got Williams's twelve-gauge shotgun out of the bedroom. The three men then got back into the car and drove to the trailer home where petitioner was staying. While Williams and Gorsuch waited in the car, Armstrong went in and talked briefly to petitioner. Armstrong and petitioner then left the trailer and got into the car. Williams drove to a bridge in an isolated rural area, where Armstrong removed Gorsuch from the car and stood him up against the bridge railing. Williams, Armstrong, and petitioner then each shot Gorsuch once in the head with the shotgun, and Armstrong pushed the body over the railing into the creek below.

Petitioner testified that Armstrong came to his trailer in the early morning hours of February 9 and said that he needed to talk to petitioner because he and Williams had killed somebody. Petitioner went with Armstrong to Williams's house and talked to the two men for awhile. He and Williams then took Armstrong home and had breakfast at Dottie's Cafe, which was run by Williams's

mother. After breakfast, petitioner returned to the trailer. He and Williams were arrested that night at a gas station on their way home from a party.

Other witnesses testified that Gorsuch left the tavern on the morning of February 9 in the company of the two Williams brothers and Armstrong. The people in the trailer where petitioner was staying that night testified that Armstrong arrived at the trailer during the early morning hours of February 9 (estimates varied from 4:15 a.m. to 6:30 a.m.) and left with petitioner after a short conversation. Williams's mother testified that Williams and petitioner arrived at her cafe for breakfast at approximately 6:15 a.m. Shotgun shells, other evidence found near the bridge, and the autopsy reports indicated that the murder had taken place essentially as Williams described.

After petitioner testified, the prosecutor began his cross-examination by asking:

> PROSECUTOR: Mr. Miller, how old are you?
>
> DEFENDANT: Twenty-three.
>
> PROSECUTOR: Why didn't you tell this story to anybody when you got arrested?

Defense counsel immediately objected and, out of the presence of the jury, asked for a mistrial. The judge denied the motion and instructed the jury to "ignore that last question for the time being." The judge did not further instruct the jury on the prosecutor's reference to petitioner's post-arrest silence.

The jury found petitioner guilty of robbery, kidnapping, aggravated kidnapping, and murder. He was found not guilty of armed robbery. Petitioner was sentenced to concurrent terms of eighty years for murder, thirty years for aggravated kidnapping, and seven years for robbery.[1]

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[1] The trial court vacated petitioner's kidnapping conviction because kidnapping is a lesser-included offense of aggravated kidnapping.

On direct appeal, a unanimous panel of the Illinois Appellate Court reversed petitioner's conviction and remanded for a new trial. *People v. Miller*, 104 Ill.App.3d 57, 59 Ill.Dec. 864, 432 N.E.2d 650 (1982). The appellate court held that the prosecutor's reference to petitioner's post-arrest silence directly violated *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and that the trial court's attempt to cure the error was insufficient. 104 Ill.App.3d at 61, 59 Ill.Dec. at 867-68, 432 N.E.2d at 653-54. The appellate court found that the evidence against petitioner was not overwhelming:

> [T]here is corroboration for the testimony of the accomplice, Randy Williams. However, nothing except Williams' testimony directly links Miller with the crimes.
>
> . . . . .
>
> The trial was essentially a credibility contest between defendant Miller and Randy Williams. The reference to post-arrest silence cast aspersions on Miller's credibility and may have irreparably prejudiced him in the eyes of the jury. Thus, reversal is required.

Id. at 61, 59 Ill.Dec. at 868, 432 N.E.2d at 654.

The Illinois Supreme Court granted leave to appeal and, over Justice Simon's dissent, reversed the appellate court's decision. *People v. Miller*, 96 Ill.2d 385, 70 Ill.Dec. 849, 450 N.E.2d 322 (1983). The majority held that although the prosecutor's comment violated *Doyle*, the error was harmless because the comment was a single, isolated reference during the course of a lengthy trial, because Randy Williams's testimony was corroborated in many respects, and because the jury was instructed to disregard the comment. *Id.*at 396, 59 Ill.Dec. at 854, 450 N.E.2d at 327. In dissent, Justice Simon pointed out that accomplice testimony is inherently unreliable and that the judge's allegedly curative instruction was insufficient. *Id.*at 397-99, 59 Ill.Dec. 855-56, 450 N.E.2d at 328-29.

Petitioner filed a petition for a writ of habeas corpus in the United States District Court on August 22, 1983, pursuant to 28 U.S.C. § 2254 (1982). On August 27, 1984,

the district court entered an order granting respondent's motion for summary judgment and denying the petition for the writ. *United States ex rel. Miller v. Greer*, No. 83-3254 (C.D.Ill. Aug. 27, 1984). The district court essentially adopted the Illinois Supreme Court's analysis, holding that the state's violation of *Doyle* was harmless beyond a reasonable doubt.

II.

The Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), that "the use for impeachment purposes of [a] petitioner['s] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Id.* at 619, 96 S.Ct. 2245. Respondent's first argument in response to petitioner's appeal is that, despite the fact that the Illinois Appellate Court, the Illinois Supreme Court, and the United States District Court all held otherwise, there was no *Doyle* violation in this case.

Petitioner was not given *Miranda* warnings when he and Williams were arrested at a gas station in the early morning hours of February 10, 1980, for unlawful use of weapons (a handgun was found under the seat of the car that they were driving). Later that day, Williams gave a formal statement to the police implicating himself, Armstrong, and petitioner in Gorsuch's murder. Immediately following Williams's statement, at 2:57 p.m., petitioner was given *Miranda* warnings and arrested for the murder, kidnapping, and robbery of Neil Gorsuch.

Respondent concedes that petitioner was given *Miranda* warnings at the time of his arrest for the instant offenses and that any comment referring to his silence after that arrest would be improper. He nevertheless argues that the prosecutor's reference to petitioner's post-arrest silence could be construed as referring to the period between petitioner's arrest on the weapons charge, when no *Miranda* warnings were given, and petitioner's arrest on the murder charge and the receipt of *Miranda* warn-

ings later that afternoon, and that the prosecutor's comment did not violate petitioner's due process rights. *See Fletcher v. Weir*, 455 U.S. 603, 607, 102 S.Ct. 1309, 1312, 71 L.Ed.2d 490 (1982) (not improper to comment on post-arrest silence in the absence of *Miranda* warnings, which affirmatively assure a defendant that he has the right to remain silent); *Feela v. Israel*, 727 F.2d 151, 157 (7th Cir. 1984) (same). Respondent asserts that it would have been natural for petitioner to have attempted to exculpate himself from any involvement in the Gorsuch murder during the period following his initial arrest because he was arrested with Williams and knew of Williams's involvement in the crime.

We cannot agree with the respondent's contentions. Although the prosecutor's question may have been intended to refer in part to petitioner's silence following his arrest on the weapons charge, it cannot seriously be maintained that the prosecutor intended no reference to petitioner's silence after his arrest for Neil Gorsuch's murder. From the jury's standpoint, the only reasonable inference to be drawn from the prosecutor's question—"Why didn't you tell this story to anybody when you got arrested?"—is that the petitioner was silent at the time of his arrest for the offenses for which he was then on trial.

We also disagree with the respondent's assertion that it would have been "natural" for petitioner to attempt to exculpate himself when he was arrested on the weapons charge merely because he was with Randy Williams at the time. Although Williams may already have been a suspect in the murder because he had been seen leaving the tavern with Gorsuch, petitioner was never even implicated in the crime until Williams gave his formal statement to the police later that day. It is not in the least bit natural for a person to try to exculpate himself for a crime of which he has not been accused. Indeed, the statement—"I did not kill anybody"—upon being arrested for unlawful use of weapons, drunken driving, or running a red light, would tend only to inculpate, rather than exculpate, the arrestee.

We conclude, as did the courts before us, that petitioner was advised of his right to remain silent for purposes of *Doyle* when he was given the *Miranda* warnings at the time of his arrest for the offenses charged at trial. *See People v. Miller*, 96 Ill.2d at 394, 59 Ill.Dec.at 853, 450 N.E.2d at 326. The prosecutor's reference to petitioner's silence at the time of his arrest therefore violated petitioner's constitutional right to remain silent. *Id.*

The conclusion that there was a *Doyle* violation in this case does not end the inquiry, however, since constitutional errors of this sort can in certain circumstances constitute harmless error. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1302 (7th Cir.1985); *Hawkins v. LeFevre*, 758 F.2d 866, 877 (2d Cir.1985). In order to satisfy its burden of proving that the constitutional error was harmless, the government must prove beyond a reasonable doubt that the defendant would have been convicted absent the violation. *Burke*, 756 F.2d at 1302. The case against the defendant must be "overwhelming" in order to apply the harmless error rule. *United States v. Shue*, 766 F.2d 1122, 1132-33 (7th Cir.1985); *Burke*, 756 F.2d at 1302.

The Illinois Supreme Court based its conclusion that the prosecutor's improper comment was harmless error on three factors: the comment was a single, isolated reference during the course of a lengthy trial, Williams's testimony was corroborated in many respects, and the trial judge gave a curative instruction. We cannot agree with the Court's reliance on these factors. Beginning with the Court's observation that the prosecutor's improper comment was but a single, isolated reference to petitioner's post-arrest silence during the course of a week-long trial, we believe that the timing of the comment overshadows its singularity. No matter how many days a trial may have lasted or how many witnesses may have appeared, the jury will pay close attention when a defendant accused of crimes as horrible as these takes the stand. That attention undoubtedly is heightened when the prosecutor

rises to attack the defendant's story on cross-examination. When one of the first questions out of the prosecutor's mouth is "Why didn't you tell this story to anybody when you got arrested?", the comment cannot be so easily dismissed as a single, isolated reference.

Turning to the corroboration of Randy Williams's testimony, the bulk of the testimony and physical evidence cited by the Illinois Supreme Court corroborated portions of Randy Williams's testimony that the petitioner did not even dispute: (1) that Williams, his brother Rick, Armstrong, and Gorsuch left the tavern together at approximately 1:30 a.m. on the morning of February 9; (2) that Gorsuch was beaten and then killed on the bridge by several shotgun blasts to the head; (3) that Armstrong went to the trailer where petitioner was staying sometime that morning, talked to him briefly, and then left with him; and (4) that Williams and petitioner had breakfast together near daybreak that morning at Dottie's Cafe.

With regard to the crucial part of Williams's testimony—his assertion that petitioner took part in the murder of Neil Gorsuch—there was no direct corroborative evidence[2] and petitioner denied being present when the murder was committed. There was no reason to find petitioner's testimony particularly incredible or Randy Williams's testimony particularly credible on this point, especially since accomplice testimony of this kind is inherently unreliable, often motivated by factors such as a promise of leniency or immunity and malice toward the accused. In short, this evidence does not come close to constituting the overwhelming evidence necessary to overcome constitutional error such as a *Doyle* violation. *Compare United States v. Hasting*, 461 U.S. 499, 511-12, 103 S.Ct. 1974, 1981-82,

[2] Rick Williams testified that on the evening following Gorsuch's murder, Randy Williams and petitioner told Rick that they had killed Gorsuch and that Rick should keep quiet about it if the police began asking questions. Petitioner denied being present when this conversation took place. At most, this testimony provides indirect evidence that petitioner was involved in the murder.

76 L.Ed.2d 96 (1983) (finding harmless error where victims promptly picked the defendants out of a line-up, neutral witnesses corroborated critical aspects of the victims' testimony, property of the victims was found in one of the defendant's possession, and there was identification of the car used and one of the defendant's fingerprints); *Feela v. Israel*, 727 F.2d at 157 (finding harmless error where defendant had an implausible alibi and was arrested near the scene of the robbery with the vest, gloves, and handgun used by the robber); *United States v. Wilkins*, 659 F.2d 769, 774 (7th Cir.) (finding harmless error where defendant was arrested in the getaway car with the stolen money and guns several blocks from the bank), *cert. denied*, 454 U.S. 1102, 102 S.Ct. 681, 70 L.Ed.2d 646 (1981). The crux of this trial was whether the jury believed the Williamses or believed the petitioner. The prosecutor's improper inquiry, magnified by coming at a time when the jury's attention was focused on the petitioner, cast substantial doubt on the petitioner's credibility. We simply cannot say beyond a reasonable doubt that the prosecutor's comment had no effect on the jury's assessment of petitioner's credibility, and hence on the jury's verdict.

Finally, in regard to the allegedly curative instruction given by the trial judge, we believe that the judge's admonition to ignore the prosecutor's reference to petitioner's post-arrest silence "for the time being" was simply too ambiguous in the setting of a clear-cut *Doyle* violation to cure the effect of the prosecutor's improper comment. The record reflects that the judge was apparently unaware that the prosecutor's question was a violation of *Doyle*. At the side bar conference following defense counsel's objection to the prosecutor's comment, the judge stated: "I will do some checking during the time he is on the witness stand on Cross Examination and if I find where he can, I will let him ask the question." Thus, the instruction that the judge gave to the jury reflected exactly what he was thinking at the time, which was that the jury might be able to consider the prosecutor's com-

ment and the implications arising therefrom at some point in the future. Because of the important Fifth Amendment guarantees protected by *Doyle*, we hesitate to hold that anything other than a clear, immediate, and unambiguous cautionary instruction can be sufficient to cure a *Doyle* violation. *See Burke*, 756 F.2d at 1303 (final jury instructions ordinarily not sufficient to cure constitutional errors). Even if we were willing to consider a somewhat imperfect cautionary instruction to be sufficient under certain circumstances, we could not conclude that the *Doyle* violation in the circumstances of this case was rendered harmless by the trial judge's obscure instruction.

In sum, we hold that the state has not met its burden of proving that the prosecutor's blatant violation of *Doyle* was harmless beyond a reasonable doubt. In reaching this conclusion, we are not unmindful of the appropriateness of deferring to the state court's assessment of the impact of prosecutorial error on state trials. However, we are respectfully unable to accept the Illinois Supreme Court's analysis in this case. Because the crucial issue at trial was credibility, the *Doyle* violation went to the heart of the truth-seeking process. The evidence against petitioner was not overwhelming, his story was not implausible, and the trial court's cautionary instruction was insufficient to cure the error. In these circumstances, we must conclude that it is not clear beyond a reasonable doubt that, absent the prosecutor's improper comment, the jury would have found petitioner guilty of the crimes for which he was convicted.

III.

In conclusion, the prosecutor committed constitutional error when he referred at trial to petitioner's post-arrest silence. When viewed in the context of the entire trial, the state has not met its burden of proving that the error was harmless beyond a reasonable doubt. The district court's judgment denying the petition for a writ of habeas corpus is accordingly reversed, and the matter remanded

with instructions to order petitioner's release from custody unless the state retries petitioner within the 120-day limit.

CUMMINGS, Chief Judge, dissenting.

Regretting my inability to join in my colleagues' opinion, I dissent for the reasons given by the Illinois Supreme Court in *People v. Miller*, 96 Ill.2d 385, 70 Ill.Dec. 849, 450 N.E.2d 322 (1983).

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS–
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,
ex rel. CHARLES MILLER,

Petitioner,

v. NO. 83-3254

JAMES GREER, Warden
Menard Correctional Center,

Respondent.

ORDER

Petitioner has petitioned the Court for a writ of habeas corpus. Respondent has filed a motion to dismiss and Petitioner has filed his response to that motion.

Petitioner was convicted of murder, kidnapping, and robbery in the Circuit Court of the Seventh Judicial Circuit, Morgan County, Illinois. The petition argues it was error to question the Petitioner on his post-arrest silence. The error occurred during the prosecutor's cross-examination.

Prosecutor:	Mr. Miller [the petitioner], how old are you?
Defendant:	Twenty-three.
Prosecutor:	Why didn't you tell this story to anybody when you got arrested?

Defense Counsel: Objection, Your Honor. May we approach the bench?

Record, Vol. VII, at 108. At the ensuing side bar, the following conversation occurred:

Mr. Leefers: Your Honor, I think this is an infringement of his exercise of his right to remain silent. At this point in time, I will ask for a mistrial.

The Court: What do you say, Mr. Parkinson?

Mr. Parkinson: Well, he has taken the stand and he is open to cross-examination extensively. He is entitled to be questioned by the state as to why he didn't talk to anybody about it at the time. It goes to his credibility and I don't think it's an improper question.

The Court: Have you got a case that said it's improper?

Mr. Leefers: No, Your Honor. I didn't think Mr. Parkinson would ask that question, quite frankly.

The Court: I will deny your mistrial, your motion for mistrial, but I will sustain the objection. The jury will be instructed.

Mr. Leefers: . . . and that Mr. Parkinson desist?

The Court: I will do some checking during the time he is on the witness stand on cross-examination and if I find where he can, I will let him ask the question. The objection will be sustained and the jury will be instructed to ignore the last question, for the time being. You may continue, Mr. Parkinson.

Record, Vol. VII at 108-09. The court's last statement was made to the jury. Apparently, the issue was never brought up again during the trial or the closing argument. *People v. Miller*, 70 Ill. Dec. 849, 853 (1983).

Petitioner claims that the use of his post-arrest silence violates the rules mandated in *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle* the Court held "that the use for impeachment purposes of Petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the due process clause of the fourteenth amendment." *Id.* at 619. The *Doyle* court, however, noted that the state had not claimed that the use of post-arrest silence might have been harmless error. The questioning about post-arrest silence in *Doyle* was extensive and far-ranging. *Id.* at 613. Subsequent cases have found that questioning regarding silence during custodial interrogation can be harmless error. *Moore v. Cowan*, 560 F.2d 1298 (6th Cir. 1977).

Harmless error is a question of whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Fahy v. Connecticut*, 375 U.S. 85 (1963). The harmless error rule emphasizes an intention not to treat as harmless constitutional errors that affect substantial rights of a defendant. *Chapman v. California*, 386 U.S. 18 (1967). In this case, there is no possibility that the prosecutor's questioning on post-arrest silence could have contributed to the conviction. The colloquy on post-arrest silence could not have taken more than fifteen seconds. There was an objection and the jury was instructed to ignore the question. The subject was never brought up again during the trial. There was, however, as the Supreme Court noted, a great deal of evidence to prove defendant's guilt beyond a reasonable doubt. Randy Williams, an individual who was present at the murder, testified that Petitioner shot the victim in the head. Randy Williams also testified that Petitioner admitted the murder in the presence of Randy's brother, Richard Williams. Record, Vol. VI at 257, 280. There was also testimony that Petitioner had admitted shooting the

victim. Record, Vol. VI at 173. Randy Williams' testimony was corroborated in numerous parts.

Considering the evidence of the whole record, it appears that the brief colloquy concerning Petitioner's post-arrest silence was beyond a doubt a harmless error. Accordingly, for the above stated reasons, the Court grants Respondent's motion for summary judgment and denies the petition for a writ of habeas corpus.

Enter this 27 day of August, 1984.

/s/ J. Waldo Ackerman
Chief U.S. District Judge

APPENDIX D

96 Ill.2d 385 ·
70 Ill.Dec. 849

The PEOPLE of the State of Illinois
Appellant,

v.

Charles MILLER, Appellee.
No. 56561.

Supreme Court of Illinois.

April 13, 1983.

Rehearing Denied May 27, 1983.

THOMAS J. MORAN, Justice:

Charles Miller (defendant), Clarence Armstrong and Randy Williams, were charged by information with the offenses of murder, kidnapping, aggravated kidnapping and armed robbery of Neil Gorsuch in violation of sections 9-1(a)(1), 10-1(a)(2), 10-2(a)(5), and 18-2(a) of the Criminal Code of 1961 (Ill.Rev.Stat.1979, ch. 38, pars. 9-1(a)(1), 10-1(a)(2), 10-2(a)(5), 18-2(a)). Defendant and Armstrong were tried separately. (Williams pleaded guilty to the charge of kidnapping and agreed to testify against defendant and Armstrong in return for which the State dismissed the other charges pending against him.) Following a jury trial in the circuit court of Morgan County, defendant was found guilty of all charges except armed robbery. He was, instead, found guilty of robbery. Although, in a separate sentencing proceeding, the State sought the death penalty, the jury recommended that defendant be sentenced to imprisonment. The trial judge sentenced defendant to concurrent terms of 80 years' im-

prisonment for murder, 30 years for aggravated kidnapping, and seven years for robbery. (The judge vacated defendant's kidnapping conviction because it is a lesser included offense of aggravated kidnapping.) The appellate court reversed defendant's convictions and remanded the cause for a new trial on the ground that the prosecutor improperly cross-examined defendant regarding his post-arrest silence. (104 Ill.App.3d 57, 59 Ill.Dec. 864, 432 N.E. 2d 650.) We granted the State leave to appeal.

Although defendant, in his answering brief, alleges numerous errors in the trial court proceedings, we find it necessary to address only the following issues: (1) whether the prosecutor improperly cross-examined defendant as to his post-arrest silence, and (2) if so, whether the error was harmless beyond a reasonable doubt.

The record discloses that, during the evening of February 8, 1980, Randy Williams, his brother Richard, and Clarence Armstrong were drinking at the Regulator Tavern in Jacksonville. The victim, later identified as 23-year-old Neil Gorsuch, was also present at the tavern and occasionally conversed with Armstrong. Gorsuch was not previously acquainted with the Williams or Armstrong. At approximately 1:30 a.m. on February 9, 1980, all four individuals left the tavern together. Later that afternoon, the victim's body was discovered partially submerged in a creek near the Markham bridge in Morgan County.

Randy Williams, the State's chief witness, testified that Armstrong offered the victim a ride to the motel at which the victim was staying. Richard Williams was driving his girlfriend's car. Randy sat next to him in the front seat, and Armstrong and Gorsuch were in the back seat. Richard first drove himself to his home, where he and his girlfriend lived, and allowed Randy to borrow the car for the evening. He began driving, with the victim and Armstrong seated in the back seat.

Randy further stated that, after driving for some time, Armstrong began hitting Gorsuch. Although his reason for administering the beating is unclear, it seems that

Armstrong believed the victim was making sexual advances. Randy eventually drove to his parents' house, at which time Armstrong took Randy's stocking cap and pulled it down over the victim's face. He then ordered him to go into the bathroom and wash off the blood. Once inside, it was discovered that the victim had defecated in his pants. He cleaned himself, and subsequently threw out his underwear.

While the victim was in the bathroom, Armstrong pocketed Randy's .32-caliber revolver which was loaded with one bullet. He also obtained Randy's shotgun and some ammunition.

The trio then returned to the car, and Armstrong shoved Gorsuch into the rear seat. He then sat in the front seat with Randy, and directed him to drive to a trailer court. Sometime during the ride, Armstrong fired the revolver into the back seat. The bullet did not strike the victim. Randy parked at the designated trailer home, which Armstrong then entered. He returned a few minutes later and sat in the front seat. Shortly thereafter, defendant emerged from the trailer and sat in the back seat of the car with the victim. Randy began driving again, at Armstrong's direction. He stated that it was still dark out at this time.

During the course of the ride, Armstrong requested the victim to perform fellatio. He refused, and Armstrong asked if he wanted to "be hurt." He still resisted, and Armstrong informed him that he was a "dead man." The defendant subsequently asked the victim if he had any money. When he indicated that he did, defendant began to hit him and demanded his money. Randy stated that he "heard" defendant rustling through the victim's pockets.

Armstrong directed Randy to stop the car when they reached the Markham bridge. Defendant exited the car, and Armstrong handed him the shotgun. Armstrong then pulled the victim out of the car, removed the stocking cap which was still covering his face, and pushed him against the railing of the bridge. Defendant, while stand-

ing at a distance of 10 to 12 feet from the victim, shot him in the back of the head. Armstrong reloaded the shotgun, and he also shot the victim in the head. He then placed a third shell in the gun, handed it to Randy, and ordered him to shoot the victim. Randy shot and missed, and the shell rolled through a gap in the bridge and dropped underneath. The gun was reloaded and Armstrong threatened Randy that he "better do it right, or we'll bury [you] with him." Randy fired a second shot at the victim and thought he may have hit him. Armstrong then grabben the victim by the feet and "flipped" him over the railing of the bridge into the creek below.

At Armstrong's direction, Randy retrieved the spent shells, except the one which fell under the bridge. All three returned to the car and sat in the front seat, with Randy driving. The shells, and the victim's wallet and driver's license were thrown out the window on the passenger side of the car.

The witness further testified that he gave Armstrong a ride home, and then he and the defendant went to a cafe, owned by Mrs. Williams, for breakfast. It was beginning to get light when they arrived at the restaurant.

Later that evening, the defendant, the Williams brothers, and Richard's girlfriend went to the Williams' house. Randy stated that, while at his parents' home, he, Richard and defendant went into a bedroom to talk. At one point during the conversation, defendant admitted to participating in the killing.

During cross-examination, Randy's testimony was impeached in certain respects. Defense counsel elicited the fact that, in a statement he gave the police following his arrest, he indicated that Armstrong fired the revolver into the rear seat of the car as they approached the murder site. He also, at one point, denied having any contact with the victim. In his statement, he indicated that Armstrong did not enter the trailer at which defendant was staying; he just opened the storm door and talked to somebody. Further, he named a different trailer park in his statement than the one in which defendant was staying.

As previously noted, Randy stated, on direct examination, that defendant was 10 to 12 feet away from the victim when he shot him. However, a pathologist testified that the victim died from contact or near-contact wounds. In addition, Randy did not tell the police officers about the conversation with his brother and defendant, during which defendant allegedly admitted his complicity in the murder. He only informed the officers that he told his brother "I think I might be in trouble." Randy admitted during cross-examination that he lied in his statement to the police. It was further disclosed that Randy had been drinking most of the day on which the murder occurred and had taken a narcotic substance that evening. He was uncertain as to the routes he had driven on the evening of the murder or the amount of time which elapsed between events.

Finally, the defense called a doctor who testified that, in his opinion, the victim was not killed at the bridge because of the small amount of blood found on the bridge. However, on cross-examination, the doctor admitted that he never personally viewed the bridge or the victim's body. His opinion was based on photographs of the scene and a review of the report prepared by the pathologist who performed the autopsy. Further evidence indicated that there was a great deal of blood and brain matter located in the area around the bridge.

Although impeached in certain instances, Randy's testimony was corroborated in a number of particulars. Numerous witnesses confirmed that the Williams brothers and Armstrong left the tavern with the victim at approximately 1:30 a.m. on the day of the murder. Richard Williams testified as to the seating arrangement in the car, and that he was dropped off at home after leaving the tavern. Dr. Dietrich, a pathologist who performed the autopsy, confirmed Randy's testimony that the victim received a beating while he was still alive. He also indicated that death resulted from at least two shotgun wounds to the back of the head. Although there was a severe laceration on the victim's forehead, he did not

believe this wound was lethal. The doctor further stated that the victim was fully clothed at the time of the autopsy, except that he was not wearing any underwear.

A forensic scientist testified that, in his opinion, all of the discharged shotgun shells were fired from Randy's 12-gauge shotgun. The witness also stated that a projectile which was recovered from the rear seat of Richard's girlfriend's car could have been fired from Randy's revolver. Three of the shells and the victim's driver's license were recovered by police in the approximate area where Randy had indicated the items were discarded. A fourth shotgun shell was found underneath the bridge.

A number of witnesses confirmed Randy's testimony that Armstrong arrived at the trailer where defendant was staying sometime during the early morning of February 8, 1980. They stated that defendant left with Armstrong at that time and did not return until after daylight. There was testimony to the effect that it was still dark when defendant left the trailer.

Mrs. Williams testified that her son and the defendant arrived at the restaurant at approximately 6:15 a.m. on the morning of the murder. She stated that it was just beginning to get light at that hour. Both parties stipulated that the sun rose at 6:59 a.m. on February 9, 1980.

Richard Williams confirmed Randy's testimony that, on the evening following the murder, the defendant and Randy spoke with him in a bedroom at his parents' house. They both admitted to participating in the murder, and defendant warned him to "be quiet about it." On cross-examination, Richard admitted to having made a statement to a police officer in which he denied knowing the victim. He also denied any conversation with his brother regarding the crime, except that Randy told him he was in trouble.

Defendant testified in his own behalf. He essentially stated that, at approximately daybreak on the morning of February 9, 1980, Armstrong came to the trailer at which he was staying and said he needed advice. He later

told the defendant that he had beaten the victim, and Randy said he hit him with a pair of "numchucks." According to defendant, they had killed the victim because they were afraid he would inform the police about the beating. Thus, it was defendant's contention that the victim was already dead when Armstrong and Randy sought his advice.

He further testified that, during the evening following the murder, Randy and Richard were conversing in a bedroom at their parents' home. Defendant said he overheard Randy say to his brother: "I really ain't kiddin'. I did kill that dude." At the conclusion of his testimony, defendant stated that he had been convicted of aggravated battery in 1976.

The prosecutor commenced his cross-examination of the defendant with the following questions:

"Q. Mr. Miller, how old are you?

A. 23.

Q. Why didn't you tell this story to anybody when you got arrested?"

Defense counsel immediately objected and asked to approach the bench. A discussion was held outside the presence of the jury, during which defense counsel requested a mistrial on the grounds that defendant's right to remain silent was violated. The judge denied the motion for a mistrial, but sustained the objection and informed the jury "to ignore that last question, for the time being." This line of inquiry was not further pursued, nor was defendant's silence commented upon during the State's closing argument.

It is clear that where a defendant is given the *Miranda* warnings at the time of his arrest and exercises his right to remain silent, the State may not comment at trial upon his post-arrest silence. (*Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91.) However, in their briefs, both parties contend that the trial record does not indicate whether defendant received the *Miranda* warn-

ings at the time of his arrest. They therefore characterize the issue as involving the propriety of cross-examining a defendant as to his post-arrest silence, in the absence of the *Miranda*-warning assurances. The State primarily cites *Fletcher v. Weir* (1982), 455 U.S. 603, 607, 102 S.Ct. 1309, 1312, 71 L.Ed.2d 490, 494, for the proposition that, where a defendant does not receive *Miranda* warnings, it does not violate "due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." The defendant relies on *People v. Beller* (1979), 74 Ill.2d 514, 25 Ill.Dec. 383, 386 N.E.2d 857, in which this court determined that the *Doyle* rule, prohibiting comment on a defendant's post-arrest silence, is applicable whether or not *Miranda* warnings have been given. Because we find that defendant did receive the *Miranda* warnings in the instant case, it is unnecessary to resolve the differing principles set forth in *Fletcher* and *Beller*.

We note initially that the parties' contentions assumed a different posture during oral argument. There, they each contended that defendant did not receive the *Miranda* warnings at the time he was initially arrested, but that he was later informed of his rights at the police station. This point is significant under the circumstances of this case.

Testimony at a pretrial suppression hearing indicated that defendant and Randy were arrested together at a gas station during the early morning of February 10, 1980. Although *Miranda* warnings were not administered, it is undisputed that defendant was arrested, at that time, for unlawful use of weapons. A police officer testified that, at the time of the arrest, he had no knowledge of defendant's complicity in the Gorsuch murder. Following their arrest, defendant and Randy were transported to the police station. Later that afternoon, Randy was interviewed by a police officer and gave a formal statement in which he implicated himself and defendant in the murder. A review of the common law record indicates that this interview was concluded at 2:30 p.m.

Also included in the common law record was an investigation report written by a police officer on February 11, 1980. This report indicates that, on February 10, 1980, Detectives Lieb and McKenna brought defendant into Lieutenant Turke's office for questioning concerning the murder. He was informed of his *Miranda* rights at 2:57 p.m. Defendant refused to talk and requested a lawyer, after which he was reincarcerated.

Under these circumstances, we conclude that defendant did receive the *Miranda* warnings at the time of his arrest for the instant offenses. The fact that he was not informed of these rights at the time of his initial arrest is irrelevant, since the unlawful-use-of-weapons charge was not the offense for which defendant was ultimately tried. Because defendant did receive the *Miranda* warnings at the relevant time, the rule enunicated in *Doyle* controls. Consequently, the State's inquiry during cross-examination violated defendant's right to remain silent.

The State next contends that, even if the prosecutor's inquiry concerning defendant's silence was improper, the error was harmless. Defendant asserts that the harmless-error doctrine is inapplicable because "[t]he prosecution's case was weak, premised solely on accomplice testimony." It is argued that the trial was basically a credibility contest between defendant and Randy, and the reference to defendant's silence may have injured his credibility.

This court, along with a number of other courts, has determined that a *Doyle* violation may constitute harmless error. (See *People v. Beller* (1979), 74 Ill.2d 514, 525, 25 Ill.Dec. 383, 386 N.E.2d 857, and cases cited therein.) As previously stated, defense counsel made a prompt objection to the prosecutor's inquiry, after which the trial judge instructed the jury to disregard the question. Normally, an instruction of this nature is sufficient to cure an error at trial. (*People v. Carlson* (1980), 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d 233.) Defendant, however, cites three cases for the proposition that remarks concerning post-arrest silence cannot be cured by a "cautionary instruction." (See *People v. Scalisi* (1926), 324 Ill. 131, 154

N.E. 715; *People v. McCray* (1978), 60 Ill.App.3d 487, 17 Ill.Dec. 856, 377 N.E.2d 46; *People v. Kilzer* (1978), 59 Ill.App.3d 669, 16 Ill.Dec. 904, 375 N.E.2d 1011.) These cases are inapposite.

In *Scalisi*, the prosecutor attempted to impeach the defendant with a statement he had previously made to him at the police station. Responding to an objection by defense counsel, the prosecutor stated, in the presence of the jury: "He is telling one story on the stand here, and at the time I talked to him right after the transaction he told an entirely different story; he was making a defense then; his counsel did not think it would get across in this case." (324 Ill. 131, 144, 154 N.E. 715.) This court determined that informing the jury to disregard the comment was insufficient to cure the error. However, this conclusion was based on the fact that the prosecutor, who was not sworn as a witness, stated a fact purporting to be within his personal knowledge. This misconduct is dissimilar to that involved in the instant case, and was one of many errors noted by the court in reversing the cause.

In *McCray*, the defendant, charged with robbery, testified on his own behalf. During cross-examination, the prosecutor inquired as to whether defendant had "[a]ny occupation other than robbing people." (*People v. McCray* (1978), 60 Ill.App.3d 487, 489-90, 17 Ill.Dec. 856, 377 N.E. 2d 46.) This error, for which the cause was reversed, simply did not involve any references to defendant's post-arrest silence. Similarly, the reversal of defendant's conviction in *Kilzer* was not based upon a *Doyle* violation. In *Kilzer*, the prosecutor improperly commented upon defendant's allegedly prior inconsistent statement which was not introduced into evidence. The court determined that the verdict may have been otherwise had the remarks not been made.

Here, it is our view that, beyond a reasonable doubt, the prosecutor's improper inquiry did not affect the verdict. In addition to the fact that the jury was informed to disregard the question, it was but a single, isolated

reference to defendant's post-arrest silence made during the course of a lengthy trial. Further, the evidence, as previously recited, was sufficient to prove defendant's guilt beyond a reasonable doubt. We do not consider this "a case in which, absent the constitutionally forbidden [inquiry], honest, fair-minded jurors might very well have brought in [a] not-guilty [verdict]." *Chapman v. California* (1967), 386 U.S. 18, 25-26, 87 S.Ct. 824, 829, 17 L.Ed.2d 705, 711.

For the above-stated reasons, the judgment of the appellate court is reversed, and the cause is remanded to the appellate court with directions to consider other issues raised by defendant in that court but not decided.

Reversed and remanded, with directions.

SIMON, Justice, dissenting:

The prosecutor's improper inquiry into the defendant's post-arrest silence was not harmless error. A prosecutor's comment upon the "silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete." (*United States v. Edwards* (5th Cir.1978), 576 F.2d 1152, 1155.) I would affirm the judgment of the appellate court which reversed the defendant's convictions of murder, aggravated kidnapping and robbery, and remand the cause to the circuit court of Morgan County for a new trial.

The State's case against the defendant depended heavily upon the testimony of Randy Williams, the defendant's alleged accomplice. As the appellate court observed, "nothing except Williams' testimony directly links [the defendant] with the crimes." 104 Ill.App.3d 57, 61, 59 Ill. Dec. 864, 432 N.E.2d 650.

Accomplice testimony of this kind is inherently unreliable as it often may be motivated by pressures other than the witness' desire to reveal the truth, "such as the promise of leniency or immunity and malice toward the ac-

cused." (*People v. Wilson* (1977), 66 Ill.2d 346, 349, 5 Ill.Dec. 820, 362 N.E.2d 291.) This court has often stated that it "will not hesitate to reverse a conviction based upon the testimony of an accomplice when that testimony lacks material corroboration or is discredited by other credible evidence." *E.g., People v. Hermens* (1955), 5 Ill.2d 277, 286, 125 N.E.2d 500.

In this case, the defendant vigorously disputed Williams' version of the events on the evening of the murder and the following morning. The defendant denied any involvement in the crime and implicated Williams. The jury had the sole responsibility for resolving the sharp conflict between the testimony of Williams and the testimony of the defendant. The resolution of this conflict depended totally upon the jury's assessment of the defendant's credibility, for the other evidence in the case could have fairly supported either the defendant's or Williams' story. The record clearly shows that the prosecutor, the trial court judge and the appellate court all understood that "[t]he trial was essentially a credibility contest between defendant * * * and Randy Williams." 104 Ill.App.3d 57, 61, 59 Ill.Dec. 864, 432 N.E.2d 650.

Given the importance of the defendant's credibility at his trial, I cannot say beyond a reasonable doubt that the prosecutor's reference to the defendant's post-arrest silence did not affect the jury's verdict. The prosecutor's statement—"Why didn't you tell the story to anybody when you got arrested?"—was obviously calculated to undermine the credibility of the defendant's story with the jury. I do not understand how anyone could know beyond a reasonable doubt that it did not succeed.

The majority erroneously maintains that the trial court's cautionary instructions rendered the prosecutor's improper inquiry harmless error. An improper inquiry by the prosecutor concerning the defendant's post-arrest silence is not automatically remedied by a cautionary instruction. (See, *e.g., United States v. Curtis* (3rd Cir.1981), 644 F.2d 263, 270-71; *cert. denied* (1982), ____ U.S. ____, 103 S.Ct.

379; 74 L.Ed.2d 512; *United States v. Prescott* (9th Cir. 1978), 581 F.2d 1343, 1352; *Morgan v. Hall* (1st Cir.1978), 569 F.2d 1161, 1168, *cert. denied* (1978), 437 U.S. 910, 98 S.Ct. 3103, 57 L.Ed.2d 1142; see also, *United States v. Hale* (1975), 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99.) If the majority were correct, the prosecutor would have little incentive to avoid such inquiries on cross-examination of the defendant; he could safely inform the jury of the defendant's post-arrest silence, risking only an objection by the defendant's counsel and a cautionary instruction by the trial court. A cautionary instruction is at best only a partial remedy. (*Cf. Bruton v. United States* (1968), 391 U.S. 123, 136-37, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476, 485.) The instruction may confuse the jury; or the jury may disregard it and use the defendant's silence against him anyway. In a close case like this one, based wholly upon accomplice testimony and circumstantial evidence, the reference to post-arrest silence can work extreme prejudice against the defendant, notwithstanding a cautionary instruction. In such cases the defendant must receive a new trial, for the *Miranda* warnings mean nothing unless an innocent defendant can remain silent at his arrest without prejudicing his case.

Even if a proper cautionary instruction could have cured the prosecutor's improper reference to the defendant's post-arrest silence, the instruction given in this case was insufficient. The trial court only directed the jury to ignore the prosecutor's remarks "*for the time being.*" This instruction is not a precise and unambiguous statement to the jury that it should ignore the prosecutor's remarks. Given that the trial was essentially a credibility contest between Williams and the defendant, this opaque instruction did not render the prosecutor's remarks harmless error. It did not prevent the prosecutor's highly questionable cross-examination tactic from infecting the defendant's entire testimony and lowering its value to the jury.

In my opinion, the prosecutor's improper remarks were not harmless error and the judgment of the appellate court should be affirmed and the cause remanded to the circuit court for a new trial.

APPENDIX E

104 Ill.App.3d 57
59 Ill.Dec. 864

**The PEOPLE of the State of Illinois,
Plaintiff-Appellee,**

v.

**Charles "Chuck" MILLER,
Defendant-Appellant.**

No. 16469.

Appellate Court of Illinois,
Fourth District.

March 3, 1982.

MILLS, Justice:

The State's Attorney asked a single, fatal question of the defendant on cross-examination.

The query was in direct violation of the U. S. Supreme Court's edict in *Doyle v. Ohio.*

Because of it, we must reverse and remand for a new trial.

FACTS

Miller, Clarence "Butch" Armstrong, and Randy Williams were charged with abducting, beating, robbing, and killing Neil Gorsuch.

Armstrong's case was tried separately. Williams pleaded guilty to kidnapping and the other charges against him were dropped when he agreed to testify against Miller and Armstrong.

Upon denial of Miller's motion for change of venue, a jury trial was held in Morgan County. The prosecution's case against Miller consisted mainly of the testimony of Randy Williams. At Miller's trial, Williams testified substantially as follows:

At 1:30 a.m. on February 9, 1980, Williams, his brother Rick, "Butch" Armstrong, and a person later identified as the victim left a tavern in Jacksonville, Illinois. The four got into a car belonging to a friend of Rick Williams. Rick drove to his house and got out. Randy began driving with the victim sitting behind him and Armstrong sitting in the back seat next to the victim. During this trip, Armstrong administered a beating to the victim.

After driving around for an undetermined length of time, the trio arrived at Williams' house. Once inside, it was discovered that the victim had become incontinent. While the victim was in the bathroom cleaning himself, Armstrong obtained from Williams a .12 gauge shotgun, shells, and a .32 caliber pistol containing one shell. When the victim exited the bathroom, Armstrong, finding feces on the floor, struck and knocked Gorsuch down. Williams attempted to clean up the feces and blood, but was not completely successful. Thereafter, the trio prepared to leave. Armstrong placed both guns in the car, shoved the victim into the rear seat, and then got in the passenger side of the car. Williams began driving and at some point, Armstrong fired the .32 caliber pistol into the back seat of the car, ostensibly to convince the victim to keep his head down. During this time, the victim's face was covered with a stocking cap.

Subsequently, with Armstrong giving directions, Williams drove to a trailer court. According to Williams, it was still dark at this time. Armstrong got out and went to a trailer, but returned shortly thereafter. Miller followed a few minutes later and got into the back seat of the car with the victim. Williams again began to drive, with Armstrong and Miller giving directions. Miller asked the victim if he had any money. According to Williams,

the victim replied affirmatively, whereupon Miller hit the victim and demanded all of his money. Williams testified that he then heard Miller going through the victim's pockets.

Williams testified that he drove west out of Jacksonville through the country until he came to a bridge, where Armstrong ordered him to stop. Miller was the first to exit the car. Armstrong followed, and handed Miller the shotgun. Williams was the next to get out. Armstrong then took the victim by the arm, pulled him out of the back seat of the car, and shoved him up against the rail of the bridge. Williams testified that Miller then shot the victim in the head. According to Williams, Armstrong took the shotgun, reloaded it, and also shot the victim in the head. Armstrong put a third shell in the shotgun and gave it to Williams. When Williams shot and missed, Armstrong ordered Williams to shoot again and to do it right this time or be buried there with the victim. As the shotgun was reloaded for this fourth shot, the empty shell fell through the floor of the bridge. Williams testified that he thought he hit the man with his second shot.

Armstrong then grabbed the body of the victim by the feet and flipped it over the north side of the bridge. On Armstrong's orders, Williams picked up the spent shells—except the one which fell through the bridge. Armstrong, Miller, and Williams got into the front seat of the car, with Williams again driving. According to Williams, it was still dark when the trio left the bridge, heading west. A short while later, the shells, along with the victim's wallet and driver's license, were thrown out the passenger side of the car. The three returned to Williams' house, where they disposed of the shotgun. While it was still dark, Williams and Miller took Armstrong home and proceeded to a cafe. It was beginning to get light out when they arrived at the cafe. Later, Williams took Miller home.

That afternoon, Miller, Williams, and Armstrong met at another tavern in Jacksonville. All of them then went to Williams' house where Williams cleaned up the house and the car used in the murder. The three returned to the

tavern. Armstrong later left, but Williams and Miller were soon joined by Williams' brother, Rick. Williams informed his brother, Rick, that he was in trouble and needed to talk. After some more drinking, Miller, the Williams brothers, and Chris Peterson went to Williams' house. Williams testified that he and Rick went into a bedroom, where he told brother Rick that "they" had killed the person who was with them the previous evening. Thereafter—according to both brothers' testimony—Miller entered the bedroom and admitted the killing. Miller and Williams then left for another bacchanalian evening. They were arrested together the next morning.

Williams' testimony was challenged in several respects on cross-examination. Williams admitted to lying to the police about what he had told his brother the day after the murder and was unable to give details of the conversation between Miller, Rick, and himself when Miller allegedly admitted the murder. It was also brought out that the day after the offense, Williams told the police that Armstrong had fired the .32 caliber pistol into the rear seat while on the way to the bridge where the victim's body was found, and not before picking up defendant, as Williams had testified at trial. Additionally, Williams admitted that he had been drinking since 1:30 p.m. on the day of the offense; could not recount exactly where he had driven on the night of the murder; and was unable to say how much time elapsed between the events leading up to the murder.

Finally, an expert witness for the defendant testified that in his opinion, the victim was not shot at the bridge where his body was found. On cross-examination, however, the witness stated that his opinion was based on the belief that the victim's body could not have hung over the railing of the bridge after the shooting, but that he had never examined either the bridge or the body of the deceased.

Despite these infirmities, there was some corroboration for Williams' testimony. Several persons confirmed that Armstrong and the Williams brothers left the tavern with

the victim. Chris Peterson confirmed the testimony that Rick was dropped off at his house soon after leaving the tavern. Although they were unable to give exact times, several witnesses testified that in the early morning hours of February 9, 1980, Butch Armstrong came to a trailer and spoke briefly with Miller, and that Miller left with Armstrong and did not return until after daylight. In addition, Randy Williams' mother testified that Miller and her son arrived at her cafe for breakfast about 6:15 a.m. on the day in question. It was stipulated that the sun rose at 6:59 a.m. on that day. The pathologist for the State testified that after performing an autopsy on the victim, he determined that the cause of death was either of two shotgun wounds to the head. Other scientific and physical evidence tended to corroborate Williams' testimony.

Miller testified in his own behalf that it was nearly daylight when Armstrong and Williams came to the trailer to see him. He stated that the pair told him that Williams had beaten the victim with a pair of "numchucks" and that the victim had been shot to prevent him from going to the police. Miller contended that Armstrong and Williams only came to him for advice *after* they had committed the murder.

OPINION

The following colloquy took place at Miller's trial between Miller and the State's Attorney, Edwin Parkinson:

"Q. Mr. Miller, how old are you?

A. Twenty-three.

Q. Why didn't you tell this story to anyone when you got arrested?"

An objection to the last question was sustained and the jury was instructed to disregard, but a motion for mistrial was denied. Defendant contends that this examination violated his 5th and 14th amendment rights to due process of law.

The clear directive issued by the Supreme Court in *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L. Ed.2d 91, and *United States v. Hale* (1975), 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99, is that prosecutors may not comment upon—nor question defendants regarding—post-arrest silence. To do so is fundamentally unfair as silence is "insolvably ambiguous" and may constitute simply the exercise of the constitutional right to remain silent. The prosecutor's comments here clearly violate this directive, and the State does not seriously contend otherwise. Rather, the State contends that any error which did occur was harmless.

In neither *Doyle* nor *Hale* was the Supreme Court faced with the question of the applicability of the harmless error doctrine. However, in *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, the Court held that even constitutional errors may be harmless if it is clear beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Additionally, our own supreme court has applied the harmless error doctrine in a case involving a *Doyle* violation. *People v. Beller* (1979), 74 Ill.2d 514, 25 Ill.Dec. 383, 386 N.E.2d 857.

However, while the harmless error doctrine may be applied to errors of this type, the *Chapman* standard was not met here. While the evidence in this case was sufficient to prove Miller's guilt beyond a reasonable doubt (see *People v. Wollenberg* (1967), 37 Ill.2d 480, 229 N.E.2d 490; *People v. Sheridan* (1977), 51 Ill.App.3d 963, 10 Ill. Dec. 34, 367 N.E.2d 422), it was not so overwhelming as to preclude all reasonable doubts about the effect of the prosecutor's comments. As previously noted, there is corroboration for the testimony of the accomplice, Randy Williams. However, nothing except Williams' testimony directly links Miller with the crimes.

We are cognizant that the jury was instructed to disregard the prosecutor's comment and that a prompt instruction will usually cure an error at trial. (*People v. Carlson* (1980), 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d

233.) As *Carlson* recognized, there are exceptions to this rule. It seems that no decision of the courts in this state has dealt precisely with the issue of whether a *Doyle* violation may be negated by a curative instruction. Federal reviewing courts have held that instruction alone is never sufficient. See *United States v. Edwards* (5th Cir. 1978), 576 F.2d 1152; and *Morgan v. Hall* (1st Cir. 1978), 569 F.2d 1161.

Such a *per se* rule is at odds with *Chapman*, which requires a more individualized approach. Nevertheless,. it cannot be said that beyond a reasonable doubt the instruction given in this case cured the error. The trial was essentially a credibility contest between defendant Miller and Randy Williams. The reference to post-arrest silence cast aspersions on Miller's credibility and may have irreparably prejudiced him in the eyes of the jury. Thus, reversal is required.

Defendant has alleged numerous other errors, but these have either been waived for failure to raise them in his post-trial motion (*People v. Pickett* (1973), 54 Ill.2d 280, 296 N.E.2d 856), or will necessarily be decided anew by the trial judge based on the factual situation presented at defendant's new trial.

Reversed and remanded for new trial.

GREEN, P. J., and TRAPP, J., concur.

85-2064

(8)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES GREER, Warden, Menard Correctional Center, Petitioner,

vs.

UNITES OF AMERICA ex rel.
CHARLES "CHUCK" MILLER, Respondent.

RESPONSE TO PETITION FOR CERTIORARI

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REASONS FOR DENYING THE WRIT

THE FEDERAL CIRCUITS UNIVERSAL APPLICATION OF THE CHAPMAN V. CALIFORNIA HARMLESS ERROR STANDARD TO VIOLATIONS OF DOYLE V. OHIO IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

The State has urged this Court to grant certiorari for the purpose of exempting violations of Doyle v. Ohio, 426 U.S. 610 (1976) from the constitutional harmless error standard mandated by Chapman v. California, 386 U.S. 18 (1967). Because the State's position is inconsistent with the prior decision of this Court and is without support in any of the federal circuits, the writ should be denied.

In Chapman, this Court held that "constitutional errors" must be shown to be harmless beyond a reasonable doubt. 386 U.S. at 23. Thereafter, in Doyle v. Ohio, this Court held that prosecutorial comment upon a defendant's post-arrest silence violates the due process clause of the fourteenth amendment. 426 U.S. at 619. Accordingly, the federal courts of appeal universally apply the Chapman harmless error standard to Doyle violations. See, e.g., United States v. Elkins, 774 F.2d 530, 539 (1st Cir. 1985); Hawkins v. LeFevre, 758 F.2d 866, 877 (2d Cir. 1985); United States v. Cummiskey, 728 F.2d 200, 204 (3d Cir. 1984), cert. denied, 105 S.Ct. 1869 (1985); Williams v. Zahradnick, 632 F.2d 353, 360 (4th Cir. 1980); Chapman v. United States, 547 F.2d 1240, 1248 (5th Cir.), cert. denied, 431 U.S. 908 (1977); Martin v. Foltz, 773 F.2d 711, 715 (6th Cir. 1985); United States v. Shoe, 766 F.2d 1122, 1133 (7th Cir. 1985); United States v. Disbrow, 768 F.2d 976, 980 (8th Cir. 1985); United States v. Ortiz, 776 F.2d 864, 865 (9th Cir. 1985); United States v. Remigio, 767 F.2d 730, 735 (10th Cir. 1985); United States v. Ruz-Salazar 764 F.2d 1433, 1437 (11th Cir. 1985).

Nevertheless, the State has argued that "Doyle" is a prophylactic measure not specified in the "Bill of Rights" and thus "violations of Doyle are not entitled to the harmless beyond a reasonable standard [sic] of review." State's Petition at p. 8. However, the Chapman mandate encompasses "constitutional error" and is not limited to violations of rights specifically enumerated in the Bill of Rights. Chapman v. California, 386 U.S. at 24. Moreover, although the State refers to Doyle as a "prophylactic measure" which is "at least three times removed from the Constitution" (State's Petition at p. 7), the constitutional importance of Doyle was recently reiterated by this Court in Wainwright v. Greenfield, 474 U.S. ___, 88 L.Ed.2d 623 (1986).

In Greenfield, this Court held that Doyle is violated when a prosecutor uses post-Miranda warnings silence as evidence of sanity. In re-affirming the constitutional underpinnings of the Doyle decision, this Court stated:

> In Doyle, we held that Miranda warnings contained an implied promise, rooted in the Constitution that "silence will carry no penalty."
>
> 88 L.Ed.2d at 632.
>
> * * *
>
> Doyle and subsequent cases have ... made clear that breaching the implied assurance of the Miranda decision is an affront to the fundamental fairness that the Due Process Clause requires.
>
> 88 L.Ed.2d at 630.

Thus, it is clear that Doyle is not merely a rule designed to increase adherence to Miranda. Instead, as this Court emphasized in Greenfield, comment upon a defendant's post-Miranda warnings silence is fundamentally unfair and constitutes a direct, wholly independent violation of the due process clause of the fourteenth amendment.

As a variant of its position, the State argues that the "harmless beyond a reasonable doubt standard" should not be enforced in habeas corpus proceedings. Referring to Judge Easterbrook's dissent, the State reasons that constitutional rules should be enforced less strictly on habeas corpus review. However, Judge Easterbrook's views were rejected by the other eight members of the en banc panel is this case and are also without support in any of the other federal circuits.

Moreover, in Wainwright v. Greenfield, Justice Rhenquest implied that the Chapman standard applies to habeas review of Doyle violations. Noting that the harmless error issue had been

waived on habeas corpus review in Greenfield, Justice Rhenquest stated:

> [T]he State does not argue here that any error was harmless beyond a reasonable doubt.
>
> 88 L.Ed.2d at 633. Rhenquest, J. concurring.

Therefore, because the federal circuits universal application of the Chapman standard to Doyle violations is consistent with the prior decisions of this Court, the writ should be denied.

CONCLUSION

For the foregoing reasons, respondent Charles Miller respectfully requests this Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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ORIGINAL

No. 85-958

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

LARRY W. EYLER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES the Respondent, LARRY W. EYLER, by his Attorney, DAVID P. SCHIPPERS, JR., and respectfully asks leave, pursuant to Rule 46(1) of the Rules of this Court, to file the attached Response to Petition For A Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District without prepayment of costs, and to proceed in forma pauperis.

Leave to proceed in forma pauperis was not sought at the trial or appellate levels. An Affidavit in accordance with Rule 46 of the Rules of this Court is attached hereto.

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LARRY W. EYLER

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No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES GREER, Warden,
Menard Correctional Center,

Petitioner,

vs.

CHARLES "CHUCK" MILLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 3, 1986
CERTIORARI GRANTED DECEMBER 1, 1986

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear in the appendix to the Petition for Writ of Certiorari:

IN THE

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OCTOBER TERM, 1985

JAMES GREER, Warden,
Menard Correctional Center,

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vs.

CHARLES "CHUCK" MILLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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JOINT APPENDIX

RELEVANT DOCKET ENTRIES

Date	Proceeding
1980	
Feb. 11	Information filed in the Circuit Court of the Seventh Judicial Circuit, Morgan County, Illinois.
July 9	Judgment of Conviction.
1982	
March 3	ORDER, Appellate Court of Illinois, Fourth Judicial District, that the judgment of conviction is REVERSED and the case REMANDED for a new trial.
1983	
April 13	ORDER, Supreme Court of Illinois, that the judgment of the appellate court is REVERSED and the case is REMANDED WITH DIRECTIONS.
Aug. 22	Petition for a Writ of Habeas Corpus.
1984	
Aug. 27	ORDER, United States District Court, Central District of Illinois, that respondent's motion for summary judgment is GRANTED and the petition is DENIED.

1985

Aug. 27 ORDER (USCA) (panel) that the judgment of the district court is REVERSED, and the case is REMANDED with instructions to order petitioner's release unless the State of Illinois retries him within 120 days.

Sept. 10 Petition for Rehearing with Suggestion of Rehearing En Banc.

Nov. 14 ORDER (USCA) (en banc) that the petition for rehearing en banc is GRANTED.

1986

April 9 ORDER (USCA) (en banc) that the judgment of the district court is REVERSED, and the case is REMANDED with instructions to order petitioner's release unless the State of Illinois retries him within 120 days.

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
MORGAN COUNTY, ILLINOIS

Criminal No 80-CF-12

PEOPLE OF THE STATE OF ILLINOIS

v.

CHARLES "CHUCK" MILLER

Randy Williams

Cross Examination by Mr. Leefers.

* * * * *

[Vol. VI, 517] Q MR. LEEFERS: Mr. Williams, you said that you were telling the truth here today, isn't that right?

A Yes, sir.

Q And that's what you came into this court to do, isn't that correct?

A Yes, sir.

Q And, you are asking everyone here in this jury box to believe that "Chuck" Miller got into the car, didn't have any prior contact, went out to that bridge, robbed him on the way, and that was the first time you saw him, isn't that right?

A Yes.

Q Notwithstanding the fact that he had no involvement whatsoever with him in the Regulator, isn't that right?

A Yes.

Q Matter of fact, in any of those things, you are sure about one thing—any of those things you say that happened prior to going to the trailer, and that only involved you and "Butch" Armstrong, isn't that right?

A Yes.

[Vol. VI, 518] Q As a matter of fact, you "Butch" Armstrong and your brother were at the Regulator, isn't that right?

A Yes, sir.

Q And, that's where you first saw Neil Gorsuch, isn't that right?

A Yes.

Q Your brother's car was involved in the incident, isn't that right?

A Yes.

Q You were driving the car, isn't that right?

A Later that night, yes.

Q You didn't have the car at your house on Sherman Street?

A Yes.

Q You drove the car along Johnson Street, isn't that right?

A Yes.

Q You drove the car somewhere north from there, did you not?

A Yes.

Q When you got to the house, it was your shotgun, was it not?

A Yes.

Q And you told "Butch" Armstrong where to get the shotgun, did you not?

[Vol. VI, 519] A Yes.

Q And you told him where to get the shells, did you not?

A Yes.

Q It was your pistol, was it not?

A Yes.

Q The man had an accident on your bathroom floor, isn't that right?

A Yes.

Q You attempted to wipe up everything, did you not?

A Yes.

Q And you threw away a carton containing a bloody towel, did you not?

A Yes.

Q You were present when "Butch" Armstrong shot at him, were you not?

A Yes.

Q You went to that trailer, did you not?

A Yes.

Q You were waiting in the car with Neil Gorsuch when "Butch" went into that trailer, were you not?

A Yes.

Q That shotgun was under that seat, was it not?

A Yes.

[Vol. VI, 520] Q You had the keys to the car, isn't that right?

A Yes.

Q You could have driven away, could you not?

A Yes.

Q Nobody forced you to go to this point, did they?

A No.

Q That was all voluntary on your part, isn't that right?

A Yes.

Q And you drove him out to the Markham Bottoms Bridge, isn't that right?

A Yes.

Q You were involved in the whole thing all the way along, isn't that right?

A Yes.

Q Mr. Miller wasn't involved in it all the way along, was he?

A Not all the way.

Q He didn't have anything to do with you or Armstrong or the guy at the house, did he?

A No.

Q He wasn't with you down at the Regulator, was he?

A No.

Q And you are asking this jury to believe that you [Vol. VI, 521] went to your house, didn't have any prior contact, shot him and then he robbed him, is that what you're asking this jury to believe?

A Yes, it is, because it is the truth.

Q You are asking them to believe that you voluntarily participated, right?

A Yes.

Q In fact, you were there, weren't you?

A Yes.

Q You saw what happened, didn't you?

A Yes.

Q And you are telling us today what you want to tell us about what happened, aren't you?

A No.

Q MR. LEEFERS: Your Honor, may we approach the bench?

THE COURT: You may.

* * * * *

[Vol. VI, 523] You may proceed, Mr. Leefers.

Q MR. LEEFERS: Mr. Williams, I have two more questions: Isn't it true that you were originally charged with kidnapping, aggravated kidnapping, armed robbery and murder?

A Yes.

Q Isn't it true that, pursuant to an agreement with the State, they have dismissed armed robbery, aggravated kidnapping and murder and they have allowed you to plead to kidnapping?

A Yes.

Q Isn't it true that that agreement is contingent upon your coming in here yesterday and today to testify, at least in part, against Charles "Chuck" Miller?

MR. PARKINSON: I object, Your Honor. That wasn't the [Vol. VI, 524] question. He was supposed to testify truthfully.

THE COURT: Restate the question, Counselor.

Q MR. LEEFERS: Isn't it true that as part of that plea agreement what you will give the State back for dismissing those three counts is that you will come in here and testify truthfully against this man (indicating)?

A Yes.

MR. LEEFERS: No other questions.

* * * * *

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
MORGAN COUNTY, ILLINOIS

(Title Omitted in Printing)

* * * * *

[Vol. VII, 75] **Charles E. Miller**
Having been first duly sworn on his oath, testified as follows:

Direct Examination by Mr. Woodruff.

Q Would you state your full name and address, please?
A My name is Charles E. Miller, 544 Brooklyn, Lot 8.
Q Here in Jacksonville?
A Yes, sir.
Q Are you also known as "Chuck" Miller?
A Yes, sir.
Q "Chuck", you are the defendant in this case, is that correct?
A Yes, sir.
Q And, you have been present throughout these proceedings and have heard the testimony?
A Yes, sir.
[Vol. VII, 76] Q Now, directing you testimony to February 9, which I believe was a Saturday, 1980, did you have occasion to see "Butch" Armstrong?
A Yes, sir, he come over to where I was stayin' on Brooklyn at the Blue Ridge Trailer Court.
Q Would you pull the microphone over a little bit? I assume it's on.
A Yes, it's turned on.
Q What were you doing at this time?

A I was asleep on the floor in the living room.
Q Did Mr. Armstrong come into the trailer?
A Yes, sir.
Q Were there any conversations ensuing between you and him?
A Yes, sir.
Q What was stated?
A "Butch" told me that he was in trouble and he needed to talk to me.
Q Who else was present at the trailer at this time?
A There was David Elliott sittin' by the kitchen table by the window; Debbie Elliott was sitting by the kitchen table; Barb Sitton was standin' in the kitchen and Theresa McDade had just come into the room. I was in the livin' room.
[Vol. VII, 77] Q Do you recall who awakened you?
A Yes, Debbie Elliott hollered at me and I woke up.
Q What happened after that?
A Well, I asked "Butch", I said, "What do you want to talk to me about", and "Butch" told me he wanted me to come with him, 'cause he couldn't say nothin' in front of all the people.
Q Did you subsequently leave the trailer?
A Yes.
Q How long was Mr. Armstrong at the trailer?
A Oh, probably a couple minutes at the most.
Q What happened after that?
A Well, I got up, put my shoes on, put my coat on and left—went out to the car.
Q Do you know about what time it was when Mr. Armstrong arrived?
A It was—it was about—it was comin' on daybreak.
Q Was there anyone else outside?
A Yes, sir, Randy Williams was in the car.
Q What kind of car was that?

A It was a brown '73 or '74 Gran Torino with a white top.

Q Where was Mr. Williams?

A He was in the driver's seat.

[Vol. VII, 78] Q Was the car running?

A I don't remember.

Q Did you get in the car?

A Yes, I got in the back seat.

Q Mr. Armstrong get into the car?

A Yes, he got in the front seat.

Q Which side of the automobile were you on, in the back seat?

A I was on the passenger side.

Q What happened after that?

A "Butch" told Randy to go out in the country someplace and Randy backed up and started down Country Club Road and the road was pretty bad—it was slick.

Q Was there anyone else in the automobile at this time?

A No, sir.

Q Did you notice anything unusual about the automobile?

A Well, when I was comin' out of the trailer, I noticed the car had a lot of slush and ice caked underneath the fender wells of the car.

Matter of fact, before I got in the car, I kicked some ice from underneath the fender well.

Q You indicated that you left the trailer court; would you describe for the jury where you all went?

A Well, when we left the trailer court, Randy backed out [Vol. VII, 79] and we started to go down Country Club Road and it got pretty bad—weather was pretty bad that night and we had to turn around, and we turned around and headed back to town.

Q Were there any conversations between the three of you during this trip?

A "Butch" and Randy was havin' a conversation in the front seat.

Q Were you able to hear what was said?

A No, the car was kinda' loud and they was talkin' in a low tone.

Q Was anything said to you?

Q Not at that time.

Q Was something said at a later time?

A Yes, I finally asked "Butch"—I just come out and asked him—I said, "Well, what was so important you had to talk to me about", and "Butch" said he was in some big trouble and he needed my advice on somethin' and I said, "Well, what", and "Butch" stated that him and Randy had killed somebody.

Q This was while all three of you were in the car?

A Yes.

Q Did Mr. Williams make any statement?

A Not at that time, he didn't.

Q Now, you indicated that you were out on the Country Club Road, and I think you said you were returning? [Vol. VII, 80] A Yes, we had to turn around.

Q Where did you go from that point?

A Well, "Butch" told Randy to go to Randy's house and we come back to, I think it was Morton and we went down to either Hardin or Clay Street and from there, we went to, I believe it was East State, in front of the blind school and turned on, I think it was Howell Street, went down to Sheridan and to Randy's house, on Sheridan Street.

Q You, in fact, went to Mr. Williams's house?

A Yes, sir.

Q What happened after you arrived there?

A Well, "Butch" and Randy opened the door and when the dome light come on, "Butch" told Randy—he pointed in the back seat, and he told Randy, "You better get this

blood cleaned out of the car and there was some blood in the car, in the back seat.

Q Okay, back to this trip just a minute: were there any more conversations between any of the parties before you arrived back at Sherman or Mr. Williams's house?

A Yes, I asked "Butch", who was this guy.

Q Did he respond?

A He said it was somebody they picked up in the Regulator.

Q Did you ask any other questions?

[Vol. VII, 81] A No, I didn't.

Q Now, after you arrived at the house and were leaving the automobile, what happened after that?

A We went in the house and when we got in the house—

Q Is that all three persons going into the house?

A Yes.

Q What happened after you got inside?

A "Butch" sat down on the arm of the couch—I stayed standin' by the front door. Randy went in the bathroom and got a towel and went out to the car and, apparently, cleaned the blood out of the car that was in it.

Q So, that left you and Mr. Armstrong in the house?

A Yes.

Q Were there any conversations between you at that time?

A Yes, "Butch" asked me, he said, "What do you think about Randy, do you think he'll say anything", you know, and I told "Butch", you know, I don't really know, you know Randy better than I do, because, in fact, I didn't really know Randy Williams.

Q How long was Mr. Williams outside?

A Three or four minutes.

Q Were there any more statements made by you or Mr. Armstrong during the time he was outside?

[Vol. VII, 82] A "Butch" just said he wasn't sure about Randy; he didn't know whether he'd say anything or not.

Q Did you ask any questions during this time?

A I'd asked "Butch" why they'd killed this guy.

Q Did Mr. Armstrong state anything to this effect?

A Yes.

Q What did he say?

A He said, that him and Randy had beat this guy up and he was gonna' go to the police on it.

Q Did Mr. Williams subsequently come back in the house?

A Yes, he come back in the house.

Q Tell the jury what happened after he returned to the house.

A Randy come back in the house and he went to the bathroom and he still had this rag or towel, whatever it was, and he come back outta' the bathroom

When he come back outta' the bathroom, there was a like between the dining room and the living room, it's an arch-way, like. There ain't no doorway and he went to the floor there and picked up this throw-rug, and underneath this throw-rug there was a stain that looked like blood on the floor. Randy asked me and "Butch" what he could use to get this up off of the floor.

[Vol. VII, 83] Q So, you discussed how to clean up this blood spot?

A Yes, "Butch" told him that maybe he could use some cleanser on it, wet the carpet and put some cleanser on it and clean it up.

Q Did Mr. Williams do that?

A Not at that time he didn't.

Q What, if anything, happened after that?

A I'd asked Randy where this blood come from and Randy said he hit this man in the head and that's where he laid on the floor.

Q Did he indicate what he had hit him with?

A I asked him, "What'd you hit him with", and in this arch-way, there was these hooks and these sticks, like on a string, and these two sticks and he indicated that that was what he'd hit him with. He picked 'em up off the hook.

Q Were these sticks similar to the numchucks that were demonstrated here in the courtroom the other day?

A Yes.

Q What happened after that?

A Well, I had ran out of beer and I asked Randy, I says, "You got any more beer", and he got me and "Butch" another beer. "Butch" said he wanted one, too.

And, then I asked, "Well, did anybody see you with this guy?", and Randy said they was seen leavin' the Regulator with [Vol. VII, 84] him, and that Randy's brother, Rick, was with 'em when they left the Regulator. I asked 'em if Rick knew about it, and Randy said no, and "Butch", then, he said he thought they oughtta' tell Rick about it, 'cause "Butch" said if the police come, he was gonna' deny ever bein' with the dude and he said Randy should do the same thing and they oughtta' tell Rick so he would say that the guy wasn't with 'em.

Q Did you make any statements about what should be told Rick Williams?

A "Butch" asked me what I thought about it and I told him that they oughtt'a just say that they took the guy home, if the police come to 'em.

Q Was there any other further conversations about this incident?

A Randy said that he would tell his brother, Rick.

Q Approximately how long were you in Mr. Williams's house?

A Thirty minutes.

Q What happened after these conversations you just outlined?

A I went to the bathroom and when I come outta' the bathroom, "Butch" and Randy was smokin' some reefers.

Q "Reefer"—you mean marijuana?

A Yes.

[Vol. VII, 85] Q Were you smoking any?

A No, they offered it to me. I don't smoke.

Q What did you do?

A I went and set down on the couch and there wasn't much more conversation. "Butch" then stated he wanted to go home. He asked Randy to take him home.

Q What happened after that?

A We all went out and got in the car.

Q You say "we all"—that's who?

A Me, Mr. Williams, and Mr. Armstrong.

Q Where did you go from there?

A We went to "Butch" Armstrong's house on Beecher Street.

Q Who was driving?

A Randy Williams.

Q What were the road conditions out?

A They was pretty slick.

Q Do you know or have any idea how long it took you to get to Mr. Armstrong's house?

A No, I couldn't say.

Q Where does he live?

A On West Beecher.

Q Were there any conversations during this trip from the car to Mr. Armstrong's house?

[Vol. VII, 86] A "Butch" just told me to make sure I don't say nothin' to nobody about it and I told him I wouldn't.

Q What happened when you arrived at "Butch" Armstrong's house?

A When we got to "Butch's" house, he asked me if I'd stay there with him and I told him, no, I had to go

up to the cab office and do some work for a guy at nine o'clock in the morning and he asked me again, and I told him no I couldn't and we got back in the car and we went—

Q Where did you and Randy Williams from there?

A From there we went to Dottie's Cafe.

Q Do you know what time it was when you arrived at that Cafe?

A Oh, approximately—a little after seven in the morning.

Q Did you have a watch on?

A No.

Q What made you think it was that time?

A Because it was before daylight.

Q What did you do after you arrived at the restaurant?

A I ate breakfast and Randy ate breakfast and—

Q Did you eat your breakfast?

A Yes, I ate my breakfast.

Q Did Mr. Williams eat his breakfast?

A I don't know.

[Vol. VII, 87] Q What else happened while you were there?

A Randy played some pool and I played a game of pool with, I think, it was Dale Williams and after I got done playin' pool, Randy played another game.

When Randy was in the process of the game, I asked him if he'd take me home, 'cause I had to get ready to go up town and he said he would after he got done playin' his game of pool.

Q Do you need a drink of water, "Chuck"?

A No.

Q Okay.

Do you recall approximately how long you were at the restaurant?

A 45 minutes to an hour.

Q Did you subsequently leave the restaurant with him? With Randy Williams?

A Yes, sir.

Q Where did you go from there?

A I went back to 544 Brooklyn.

Q This is the trailer court?

A Blue Ridge Trailer Court.

Q Were there any conversations on the way back to this trailer court between you and Randy Williams?

A No.

Q What was Mr. Williams's demeanor; I mean, how was he acting?

[Vol. VII, 88] A He was quiet.

Q What happened, if anything, once you arrived back at the mobile home?

A When I got back, I went inside.

Q Who was there when you got there?

A David Elliott was settin' on the couch, watchin' television.

Q Was he awake?

A Yes.

Q Who else was there?

A Barb Sitton was in the kitchen, settin' at the kitchen table.

Q Was she up and awake?

A Yes, she was awake.

Q Okay, who else was there?

A Theresa McDade was in bed alseep and Debbie Elliott was asleep and "Butch" Beddingfield was asleep.

Q What, if anything, did you do when you went into the trailer?

A Well, I talked to Dave a little bit and after I talked to David, I went in the bathroom and cleaned up and put on some old clothes so I could go up town and do some work and then I woke Theresa up and told her she had to take me to the cab office.

[Vol. VII, 89] Q Do you recall approximately what time this was when you woke Theresa up?

A It was 8:30 when I woke her up.

Q What did she do after you woke her up?

A She got up and started to get ready and Julie Price come in the trailer and she said she was goin' to a doctor, and Theresa told her she would take her while she took me to the cab office.

Q Who is Julie Price?

A She's a girl that lives in the next row in a trailer.

Q Did you subsequently leave the trailer?

A Yes, I went out and started the car and warmed it up and Theresa come out and got in the car and we pulled over by Julie's trailer and waited for her to come out.

Q Is that a neighboring trailer, close by?

A Yes.

Q And what did you do then?

A Julie got in the car and I went to the cab office; they took me to the alley next to the cab office and I got out. I went into the cab office and asked the dispatcher if Jack Ginter had been there and she said he wasn't there yet.

Q You spoke to someone in the cab office?

A Yes.

Q Who was that person?

[Vol. VII, 90] A It was a lady dispatcher; I don't know her name.

Q Was that the lady that testified here the other day?

A Yes, sir.

Q You were asked about Mr. Ginder?

A Yes, sir.

Q What did she say?

A She said that he had not been there yet, that I would have to come back later.

Q What did you do then?

A From there I went over to Gene's Barber Shop; it's right across the street and I set in there and talked to Gene for awhile, and when I was over there, he told me a guy had been lookin' for me and I was supposed to work on his car for him.

I stayed around there for a little while and I went back to the cab office about half hour later to see if Jack was there. When I got there, I went inside and the dispatcher said Jack hadn't showed up yet and I'd have to come back later and when I was walkin' out the door, Jack come around the corner and I talked to him, and he said he wouldn't need me and he said to come back Monday, probably need me Monday.

So, I went back to the barber shop and asked Gene where this guy was that wanted me to work on his car and he told me he was over at the Drexal playin' pool tournament.

[Vol. VII, 91] Q So, you're up town and you've gone back and forth, is that right?

A Yes, sir.

Q What did you do after that?

A I went to the Drexal and got this guy's car and it needed a door window in it and I went to several places to Surratt's and B. & W. Motors.

Q What kind of places are these?

A These are junk yards.

Q Okay.

A And, I made a phone call to Ray Hayes and asked him if he had one and I couldn't find a window for his car, so I stopped by the trailer.

Q This is back out at Brooklyn?

A Back out at Brooklyn, yes.

Q Did you go in the trailer?

A Yes.

Q Who was there when you arrived?
A When I got there was Theresa McDade, Debbie Elliott, David Elliott, Barb Sitton and "Butch" Beddingfield.
Q What did you do after you got there?
A Well, "Butch" Beddingfield, David Elliott, and Barb Sitton was gettin' ready to go up town to play some pool and they asked me to go with them and I said I would after I took [Vol. VII, 92] this guy's car back and asked them if they'd follow me to the Drexal.
Q Did they?
A Yes, they followed me to the Drexal and I took this guy's car keys in to him and told him where his car was and got in the car with "Butch" Beddingfield and David Elliott and Barb Sitton.
Q Whose car was this?
A I think it was Barb Sitton's car.
Q Okay, and what did you do then?
A We went to the bowling alley.
Q Do you have any idea what time it was when you arrived at the bowling alley?
A I can't be for sure.
Q And which bowling alley is this?
A The one on Walnut.
Q What did you do while you were out there?
A Played pool and drank some beer.
Q Do you have any idea how long you were there?
A Probably a couple hours.
Q What did you do when you left the bowling alley?
A I had Barb take me back up to Gene's.
Q This is the barbershop?
A This is the barbershop, yes.
[Vol. VII, 93] Q What did you do there?
A I talked to Gene for a little while. I was kinda' tired 'cause I hadn't got much sleep, so I called Theresa at the trailer and asked her if she'd come and get me.

Q Did she, in fact, come up there?
A Yes, she come and got me.
Q Where did you go from there?
A I went back to the trailer on Brooklyn.
Q Do you have any idea what time it was when you got back to the trailer?
A Oh, 'bout, approximately 1:30.
Q Was there anybody there when you arrived?
A Yes, Debbie Elliott and her two kids.
Q Anybody else?
A Just Theresa and me.
Q What did you do after you got back to the trailer?
A I laid down and went to sleep.
Q Did you have occasion to see "Butch" Armstrong or Randy Williams later that same day?
A Yes.
Q When was that?
A It was about 4 o'clock, they come out to the trailer and—on Brooklyn.
Q Okay, you say "they came out to the trailer", were [Vol. VII, 94] they in a car?
A Yes.
Q What kind of car was that?
A It was the same '73 or '4 Gran Torino.
Q Did they come in the trailer?
A "Butch" did.
Q Where was Randy Williams?
A He was in the car.
Q Did you have any conversations with "Butch" Armstrong?
A Yes.
Q What did he say?
A He asked me if I wanted to go drinkin' with him and Randy.
Q What did you say?

A I told 'em no, but I told him they could give me a ride up town.

Q What happened after that?

A They give me a ride up to Gene's Barber Shop.

Q Now, this is the same barbershop?

A Same barbershop, yes.

Q Do you have any idea what time it was when you arrived at the barbershop?

A Approximately 4:30.

Q This is barbershop is just across the street from [Vol. VII, 95] the cab company?

A From the cab office, yes.

Q So, you got there about 4:30; what, if anything, happened after that?

A I just set around in there and I talked to Gene and I played cards with somebody; I can't remember who it was.

Q Did you ever see "Butch" Armstrong or Randy Williams again that day?

A I seen Randy Williams again, yes.

Q About what time was that?

A Gene was gettin' ready to close and he give me his car keys—he closes at 5:30, and I went down the street and got his car and brought it back for him and after that, I went to Bahan's, I walked over to Bahan's, and Randy Williams was there.

Q Who all was at Bahan's that you knew?

A Randy Williams, Rick Williams, Chris Peterson, and Randy and Rick's mom and dad.

Q Will you describe to the jury what you all did there at Bahan's?

A I was settin' at the bar at first and Randy came up to the bar and invited me over to the table and said he wanted me to shoot some pool with him and I got up and went to set at the table that Rick and Chris and

Randy's mom and dad was [Vol. VII, 96] settin' with Randy.

Q Were there any conversations between you and Randy Williams or Rick Williams at that time?

A No, we was just talkin' about shootin' pool at that time.

Q About how long were you there?

A Maybe an hour and a half or two hours.

Q Did you subsequently leave Bahan's?

A Yes, Rick Williams, Chris Peterson, Mr. and Mrs. Williams, they wanted to go over to Andy's and get something to eat and Randy invited me to go with them.

Q Did you go?

A Yeah, I went.

Q Now, did you all walk out together?

A Yes.

Q Were there any conversations between you and Randy Williams or you and anyone else at that time?

A No.

Q Any conversations between the others?

A Well, when we walked out, Randy and Rick's mom and dad was—and Chris Peterson was kinda' together and then there was Randy and Rick, they was walkin' together and I was a little bit behind, but Randy and Rick was talkin' and when I walked up, they quit talkin'—I caught up with 'em.

[Vol. VII, 97] Q Were you able to hear what was said?

A No, sir, I wasn't.

Q Did you eventually get to Andy's?

A Yes.

Q Would you describe for the jury what happened at Andy's?

A Well, when we got to Andy's, we all set at the same table and Mr. and Mrs. Williams, Chris Peterson, Rick Williams bought somethin' to eat and me and Randy didn't eat.

Q How long were you there at Andy's?

A Randy was talkin' about goin' to Harold's and he wanted to get there before the band started.

Q Is that Harold's Club, here in Jacksonville?

A Yes, Harold's Club and we stayed there and drank a few beers and it was about—it was a little bit before 9:00 and I looked at the clock and I told Randy we'd better get goin' if we wanted to get there before the band started and I told Randy I didn't have any money to get in with, and he give me $5.00, so I could get in.

From there, we left—me, Randy Williams, Rick Williams, Chris Peterson, I think.

Q You say you left; did you leave in the car?

A Well, we went out the back door. The car was parked at Bahan's parking lot.

[Vol. VII, 98] Q Where did you go from there?

A We went to Randy Williams's house.

Q The house at 310 Sherman?

A Yes.

Q What happened when you arrived at the house on Sherman?

A We all went inside; me, Chris Peterson, and Rick Williams set down at the dining room table. And Randy Williams went into—at least, I think it was, his bedroom and he had a big bag of reefers.

Q You're talking about marijuana again?

A Yes.

Q What happened then?

A Well, Randy lit a joint and he lit it and started passin' it around. They asked me if I wanted some, and I said, "No", but Randy, Rick and Chris was smokin' it.

Q What were you doing?

A Well, I got up and went over and I asked Randy if I could look through his tapes and he said, "Yeah", and I went over to the tape player and was lookin'

through the tapes, and I picked a tape up that was "Bad Company" tape and put it in the tape player and when I was messin' with the tape, Randy and Rick went into the back room, back bedroom.

Q Where was Christine Peterson?

[Vol. VII, 99] A She was still settin' at the dining room table.

Q Had there been any conversations in the house?

A Just idle talk, at that time.

Q You say Randy and his brother went in the bedroom; what did you do then?

A I went back and set at the table. I had a beer at the table.

Q What did you do then?

A I set there for a few minutes and I wondered what Randy and Rick was doin', so I got up and went in the other room, where they was at.

Q Were there any conversations going on when you walked into the room?

A Yes, Randy and Rick was talkin'.

Q Did you hear what was stated?

A Randy said to Rick, he said, when I come in, he said, "I really ain't kiddin'. I did kill that dude", and that's what he said.

Q Was there any response by Rick Williams?

A Rick said—the only thing he said, he said, "You better not've".

Q Did you say anything?

A No, I didn't.

Q What happened after this?

[Vol. VII, 100] A We all walked out of the bedroom and we went into the livin' room, then.

Q What were you all doing at that point?

A Rick Williams and Chris Peterson set on the couch and I was standin', like in the arch-way, between the dinin' room and the livin' room.

Q Did you have any more conversations with Rick or Randy or Chris Peterson, for that matter?

A Yes, in this archway, there was these hooks, and these sticks that I indicated earlier was hangin' from these hooks.

Q Are you referring to numchucks?

A Yes, and I asked Randy, "How do you use these things?" Rick, then, told Randy, said "Go ahead and show him", and Randy took these things off the hook and he started swingin' 'em around his shoulders and under his legs and stuff, showed me how to use 'em.

Q What did you do?

A I just watched.

Q Now, what happened, if anything, after this?

A Well, after that, we all went out and got in the car and Randy asked Chris and Rick if he could use the car for the night and they said, "Yes", so we took Rick Williams and Chris Peterson to the house down the street.

[Vol. VII, 101] Q That's where they reside?

A Yes.

Q Where did you go from there?

A Harold's Club.

Q Now, who all went to Harold's Club?

A Me and Randy Williams.

Q You were alone, you two?

A Yes.

Q Do you recall what time you arrived at Harold's Club?

A It was probably about 9:30 or so, 'cause the band had already started, when we got there.

Q Do you remember the name of the band?

A No, I don't. It was one of the regular bands.

Q Okay, now, what did you and Randy Williams do while at Harold's Club?

A Randy went and set at a table with some people he knew and I more or less just run around. I played the pinball machine, played a game of pool and talked to some friends of mine that was in there.

Q Did you have any more conversations with Randy?

A He asked me one time if I knew where he could get any dope.

Q What'd you say?

A I tole him that I might know somebody, that I'd ask [Vol. VII, 102] around and I asked him what he wanted.

Q How long were you in the Harold's Club?

A Till closin' time.

Q And do you know what time their closing time is?

A About 1:30 is when they usually close.

Q What did you do after this place closed?

A Well, I talked to a guy out there, David Fanning, and he said he was havin' a birthday party at his house down at Murrayville, and he asked me if I wanted to come and I told him I'd come if I could talk Randy into goin', 'cause Randy the only way I had gettin' there, so I went and talked to Randy and he said he would go, so we then went out and took two other guys with us.

Q Who were these other persons?

A Mark Lockwood and Alex Daniels.

Q You had met them at the Harold's Club?

A Yes, met 'em at the Harold's.

Q Did you, in fact, go out to this place?

A Yes, we went out there.

Q Now, where was that, again?

Q It was right off Highway 67, before you get to the junction that goes to Murrayville.

Q Do you have any idea what time it was when you arrived there?

[Vol. VII, 103] A Probably 2:30.

Q How long did you stay at this party?

A We stayed a couple of hours.

Q Did you have any conversations with Randy about this incident that you discussed with him earlier?

A No, we was all playin' cards; we was playin' a game of poker for small change.

Q How long were you at this party?

A Probably a couple of hours is all.

Q Did you have any idea what time it was when you left?

A I couldn't say, no.

Q Who all left?

A When we left—it was me, Randy Williams and Mark Lockwood.

Q Where did you go from the party?

A I was drivin' 'cause Randy was too messed-up; he couldn't drive and he was runnin' off the road on the way down there, so I drove back. From there, we went back to Jacksonville.

Q Who all left the party with you?

A Me, Mark Lockwood and Randy Williams.

Q And you were driving Randy's car, is that correct?

A Yes.

Q Where did you go from the party?

[Vol. VII, 104] A We went back to Jacksonville.

Q What did you do when you got back in town?

A We went and got somethin' to eat and then we took Mark Lockwood home to the Rollin' Acres Trailer Court.

Q What happened after that?

A After that, Randy told me, he says, "I want you to take me over to "Butch's" house", so I took him over to "Butch's" house.

Q Is this "Butch" Armstrong's house on Beecher?

A Yes, sir.

Q Okay, what happened when you got there?

A We went up and knocked on the door, "Butch's" brother, Buster, opened the door and we stepped in, and when he answered the door, I stepped up on the step and Buster was mad and Randy said, "Where's 'Butch'? and Buster said he was in jail and the police wanted to talk to Randy and his brother, Rick; he'd better get to the police station.

Q Did you say anything at that point?

A No, I didn't.

Q What happened after that?

A Randy kept, you know, wantin' to know what "Butch" was in jail for and Buster and—he got mad, and he said, "Well, you just better get up to the police station, you and your brother both", and we left after that. [Vol. VII, 105] Q And then what happened after you left the Armstrong house?

A I started the car up and looked at the gas gauge and it was settin' on empty and he give me a dollar and we went to the Derby Gas Station.

Q Where is that?

A It's on Morton.

Q Would you tell the jury what, if anything, happened after that?

A Well, when we got out there, I got out and turned the pump on and waited for the man on the inside; he had to turn the pump on before I could get any gas and while I was standin' there, the police pulled up and told me to get up against the car and handcuffed me and took me to jail—took Randy to jail, too.

Q So, you were arrested there at Derby?

A Yes.

Q Did you see them find any weapons in the automobile?

A Yes, they found a pistol underneath the seat.

Q Have you ever seen that pistol before?

A No, sir.

Q All this time you were in the automobile, did you ever notice any weapons in there?

A No, sir.

[Vol. VII, 106] Q That's from the time they first came by to get you at the trailer until you were arrested, did you ever see any weapons at all in there?

A No. sir.

Q Now, "Chuck", when you were first told about somebody killing somebody, did you believe these guys at the time?

A No, sir.

Q What was your feeling, do you recall?

A I thought they was kiddin', but I didn't really believe 'em.

Q Now, I'm going to ask you, and I want you to just take your time: did you ever go out in the western part of the country on the edge of Jacksonville with Randy Williams on February 9, 1980?

A No.

Q Did you ever drive to a bridge anywhere with Randy Williams?

A No, sir.

Q Did you ever shoot anybody with a shotgun or any other weapon that same day?

A No, sir.

MR. WOODRUFF: Thank you. That's all I have.

MR. PARKINSON: I'd like to ask for a short recess, Your Honor.

[Vol. VII, 107] THE COURT: We will take a short recess.

Take the jury out.

(Short recess was taken.)

THE COURT: Bring in the jury.

Be seated, please.

MR. WOODRUFF: Your Honor, I wonder if I might just ask one or two questions before Mr. Parkinson begins?

THE COURT: You may.

Direct Examination Continued.

Q "Chuck", you've been in trouble with the law before, haven't you?

A Yes, sir.

Q Have you ever been convicted of a felony?

A Yes, sir.

Q What was that?

A Aggravated battery.

Q When were you convicted?

A April 16, 1976.

Q That doesn't have anything to do with this case, does it?

A No, sir,

Q Thank you. Nothing further.

[Vol. VII, 108] THE COURT: Mr. Parkinson, please.

Cross Examination by Mr. Parkinson.

Q Mr. Miller, how old are you?

A 23.

Q Why didn't you tell this story to anybody when you got arrested?

MR. LEEFERS: Objection, Your Honor. May we approach the bench?

THE COURT: You may.

(Whereupon the following colloquy ensued out of the hearing of the jury:

MR. LEEFERS: Your Honor, I think this is an infringement of his exercise of his right to remain silent. At this point in time, I will ask for a mistrial-

THE COURT: What do you say, Mr. Parkinson?

MR. PARKINSON: Well, he has taken the stand and he is open to cross examination extensively. He is entitled to be questioned by the State as to why he didn't talk to anybody about it at the time. It goes to his credibility and I don't think it's an improper question.

THE COURT: Have you got a case that says it's improper?

MR. LEEFERS: No, Your Honor. I didn't think Mr. Parkinson would ask that question, quite frankly.

[Vol. VII, 109] THE COURT: I will deny your mistrial, your motion for mistrial, but I will sustain your objection. The jury will be instructed.

MR. LEEFERS: And that Mr. Parkinson desist.

THE COURT: I will do some checking during the time he is on the witness stand on Cross Examination and if I find where he can, I will let him ask the question.)

The objection will be sustained and the jury will be instructed to ignore that last question, for the time being. You may continue, Mr. Parkinson.

MR. PARKINSON: Mr. Miller, I believe you said that you were sleeping at the trailer when Mr. "Butch" Armstrong came in and asked for your advice, is that correct?

A Yes, sir.

Q When he came into the trailer, did he tell you what he wanted your advice for?

A No, sir.

Q About what time do you think that was?

A It was comin' on daylight.

Q Just like it was coming on daylight when you were eating at Dottie's Cafe a little bit later?

A No, it wasn't comin' on, it was already daylight when we got to Dottie's Cafe.

Q Now, he woke you out of a sound sleep there on the [Vol. VII, 110] floor and you moseyed on out to the car, is that right?

A Yes, sir.

Q Okay. Were you very tired?

A Yes, I was very tired.

Q Are you a pretty good friend of "Butch" Armstrong's?

A Yes, sir.

Q Does he ask for your advice often?

A Sometimes.

Q What about?

A Nothing in particular.

Q But he wakes you up and doesn't tell you what he wants your advice for and you just get dressed and put your shoes on and come on out to the car before daylight, is that right?

A Yes, sir.

Q When you got in the car, you got in the back seat?

A Yes, sir.

Q When was the first anyone said anything about this advice they wanted from you was for?

A It was on the way to Randy's house.

Q After you turned around on Country Club Road?

A Yes, sir.

Q So, from the time when you left the trailer until you got out on Country Club Road and turned around, you didn't know [Vol. VII, 111] what they were asking you?

A No, sir.

Q And you still just got out of this nice, sound sleep and they're just driving you around on these rotten roads in the early morning hours as it's getting daylight?

A Yes, sir.

Q Didn't that make you mad?

A No, sir, it didn't.

Q Was he going to pay you for this advice, or what?

A No, sir.

Q Tell us again, how it was that you learned what they wanted this advice for.

A Well, what I'd learned—they said that they'd killed somebody—

Q Who said?

A "Butch".

Q "Butch" said that they'd killed somebody?

A Yes.

Q Was that before you got to the house, or after you got in the house?

A That was before we'd got to the house.

Q Now, when you got out of the car and went into the house, you said that you noticed something in the back seat?

A Yes, there was blood in the back seat.

[Vol. VII, 112] Q How do you know it was blood?

A That's what it appeared to be. It was a red stain, and "Butch" said that it was blood.

Q He said it was blood?

A Yes, he told Randy he better get it cleaned up.

Q Oh. Now, how is it you saw it so well if it isn't daylight yet?

A Dome light in the car come on.

Q How did it come on?

A When they opened the door to get outta' the car.

Q Are you sure that dome light worked?

A Sure—pretty sure.

Q That would be the only way you could see it, is if the dome light worked, wouldn't it?

A No, it was pretty light outside.

Q Well, did you see the blood because it was pretty light out or because the dome light came on?

A I thought the dome light came on.

Q Now, what do you think?

A I still think the dome light came on.

Q I believe you said something about "Butch" wasn't sure about Randy?

A That's right.

Q What did he mean by that?

[Vol. VII, 113] A He didn't know whether Randy would tell or not.

Q Now, you still didn't believe that there had been a murder committed, did you?

A No, sir.

Q Thought they were just kidding?

A Yes.

Q You thought that they got you up out of a sound sleep to tell you this joke?

A No, when I seen the blood, I thought maybe they'd hurt somebody pretty bad.

Q Okay. Now, when you got in the house, you said there were these sticks.

A Yes.

Q Hanging over the archway—you asked Randy what he'd hit the guy with?

A Yes.

Q And I think your testimony was that he'd indicated that's what he'd used?

A Yes, he reached up and pulled one set of 'em off the hook.

Q Well, what did he say about that?

A He said this is what he hit him with.

Q What did "Butch" say?

A "Butch" didn't say nothin' about it—he said he [Vol. VII, 114] beat him up in the car, but he didn't say nothin' about usin' anything on him.

Q Did "Butch" or Randy tell you who beat him up the worst?

A No.

Q Did Randy say where he had hit him?

A Yes, he said he hit him with them sticks.
Q Did he say where he hit him?
A He said he hit him in the head.
Q Front of the head or back of the head?
A He didn't say.
Q Did "Butch" say where he'd hit him?
A No, sir.
Q Did you ever bother to ask where the body was?
A Yes, I asked 'em, "Where's this guy at?" "Butch" said they got rid of him.
Q Did you bother to inquire where they got rid of him?
A No, sir.
Q Could have been under the rug with that blood stain, for all you know, couldn't it?
A For all I know. I don't know what they done with it.
Q Now, what about this throw rug that they picked up?
You said you saw a blood stain under it?
A Yes, sir.
[Vol. VII, 115] Q Is that the one that Randy tried to clean up?
A He didn't try to clean it up at that time.
Q Well, did you still think they were kidding when you saw the blood stain on the floor?
A I thought that they'd hurt somebody, but I wasn't for sure, if they'd killed anybody or not.
Q Well, you were for sure that they told you they were in trouble, or "Butch", I guess, was in trouble.
A They acted like they was in trouble. They was nervous.
Q If I understand your testimony, then, you got a beer and you sat down and you began giving them this advice that they'd sought from you?
A They asked me, yes, uhhuh.

Q What they should say if the police came around, and things like that?
A Yes.
Q And, you volunteered this information, your good advice, over a beer?
A Yes.
Q Tell us again what you told them to do.
A I told 'em they oughtta' tell the police that they took this guy home.
Q Now, after you'd seen the blood in the car and the blood on the floor and after they'd told you that they'd [Vol. VII, 116] killed him and after you'd seen these sticks, what did you hang around for?
A I didn't hang around very much longer.
Q Well, then you took "Butch" home?
A Yes.
Q Then you went to Dottie's Cafe and ate breakfast with a guy who said he'd killed somebody, is that right?
A Yes.
Q Didn't that scare you?
A No, I really wasn't for sure whether they'd killed anybody or not.
Q Did it scare you that they'd beaten somebody up and thought they'd killed someone?
A No.
Q So, you just went over to Dottie's Cafe and ate breakfast with a murderer?
A With Randy.
Q Okay. I believe you said when you got back home about 8:30 in the morning, you woke Theresa up and told her to take you up to the cab office?
A Yes, sir.
Q You said something about changing some pants; you wanted to change from the pants you were wearing into some older pants so that you could work on this car.

[Vol. VII, 117] A Yes, sir.
Q Did you have some good pants on or something?
A Yes, sir, I did.
Q Like you've got on today?
A No, they was good jeans—blue jeans.
Q Dress jeans instead of working jeans?
A No, they was just—they was a fairly new pair of blue jeans.
Q Had you been wearing them very long?
A I had wore 'em the day before.
Q Were they dirty?
A Yes, they was dirty.
Q Then why didn't you work in them?
A Because I didn't want to get oil, grease on 'em. I was supposed to work on a car for a man.
Q What happened to those jeans?
A I threw 'em on the washin' machine.
Q Who does your wash?
A Theresa McDade.
Q Now, then, later that day, I believe that you, after Gene's Barber Shop closed, he got through with all of his many haircuts that day, I take it? Is he pretty busy giving haircuts?
A Sometimes.
[Vol. VII, 118] Q Giving as many haircuts as he usually does there, late Saturday afternoon?
A Not on Saturday, he don't.
Q Did he close around 5:30, and you walked over to Bahan's and saw Randy and his family and friends?
A Yes.
Q Now, as I understand it, you said as you shot pool for about an hour or an hour and a half?
A Yes.
Q No conversation with Randy about this thing the night before, again?
A No, nothin' about that, no.

Q You still didn't think much of it?
A No, sir, I didn't.
Q Thought he was kidding?
A Yes, sir.
Q Then you walked over to Andy's place and I believe from what you said, you didn't eat and Randy didn't eat?
A No, sir.
Q There was some talk about wanting to go to Harold's?
A Yes, sir.
Q About what time was that that Randy asked you to go with him to Harold's?
A He said somethin' about it in Bahan's.
[Vol. VII, 119] Q Okay, and do you know about what time it was that you left Andy's place?
A Yes, it was a little before nine.
Q And, what time did the band start?
A Supposed to start at nine o'clock.
Q Randy said something about he wanted to hurry up and go there before the band started?
A Yes.
Q Why would you want to get there before the band started?
A To get there to hear 'em start.
Q You wouldn't have to pay a cover charge, maybe?
A No, you pay a cover charge, yes.
Q But Randy was real anxious to get there before the band started around nine?
A Yes.
Q So, you left Andy's and Randy was so excited to get to Harold's so quickly, instead, you went over to Randy's house?
A Yes, because he said he wanted to change clothes before he went.
Q Now, Randy came out with a big bag of reefers?
A Yes.

Q You didn't use any, but the other three did?
[Vol. VII, 120] A I didn't use it; I don't smoke.
Q Don't smoke at all?
A I smoke cigarettes.
Q So, when you said you don't smoke, you just don't smoke dope?
A I don't smoke dope.
Q What do you smoke?
A I smoke cigarettes.
Q Anything else?
A Cigars.
Q Now, I believe you said you were out there with Randy at Harold's Club until closing time?
A Yes, sir.
Q Never discussed this again?
A No, sir.
Q Randy never brought it up again?
A No, sir, he didn't.
Q Well, but at the apartment at his house, before you went to Harold's, you kinda' was curious what he and Rick were talking about?
A Yes, sir.
Q And you came in on the tail end of the conversation where he said, "I really ain't kiddin': I killed that dude"?
A Yes, sir.
[Vol. VII, 121] Q And you still thought he was just kidding?
A I didn't know what to think, really.
Q Well, Mr. Miller, wasn't there some time in this whole period of time—
A I thought in the house, when I seen the blood, I thought, maybe, they hurt somebody pretty bad, but I didn't really think they'd killed anybody.

Q How about "Butch", your good friend—didn't you talk to him all that Saturday?
A No, I didn't.
Q Weren't with him at all?
A No, that Saturday that him and Randy had come over to my house, that's the only time that I'd seen him.
Q How about up at Bahan's later that afternoon?
A He wasn't up there when I walked over there.
Q Well, not when you walked over—didn't you ever see "Butch" there at Bahan's, at all?
A Saturday?
Q Saturday afternoon, before you went to Andy's.
A No, sir.
Q He wasn't in there at all?
A I didn't see him.
Q Now, "Butch", you never bothered to ask him again if he was kidding, as after all, he woke you up?
[Vol. VII, 122] A No, sir.
Q Now, you went to this party at Murrayville, took Randy along?
A Yes, sir.
Q When you got back to town, you went and ate breakfast—where'd you go?
A Sambo's.
Q Okay. You took Mark Lockwood with you?
A Yes, sir.
Q No conversation with Randy, again, about beating up the guy or killing him?
A No, sir.
Q Then you went over to "Butch" Armstrong's house, just shortly before you were arrested, didn't you?
A Right after we took Mark Lockwood to Rollin' Acres, yes.
Q And, you said Buster—that's "Butch's" brother?
A Yes, sir.

Q He was really mad, wasn't he?
A Yes, sir.
Q Said that the police were looking for Randy and Rick and that his brother, "Butch", was in jail?
A Yes, sir.
Q Didn't you think you'd better get away from them—
[Vol. VII, 123] or did you think they were still kidding?
A No, I didn't think they was kiddin'; I thought they was in trouble.
Q For hurting a guy or killing a guy?
A I didn't know whether they was in trouble for hurtin' him or killin' him or what.
Q So, for almost 20 hours or so, you had been roused out of your sleep, because "Butch" wanted your advice on something that he thought he was in trouble for; you had been driven around town, and back to Randy's house. You saw blood in the car; you saw blood in the apartment and you'd been told several times that they'd killed someone, and you thought they were kidding?
A Yes, sir.
Q And you just hung around them; is that right?
A Yes, sir.
Q "Butch" ever ask for your advice when he beat someone up before?
A No, sir.
Q Didn't you think that was kind of strange for him to just ask for your advice, like that?
A No, sir, he was nervous and he was worried about something.
Q You could tell that because you know him pretty well?
[Vol. VII, 123a] A Yes, I know "Butch" pretty well.
Q Well, would he get nervous about just beating somebody up?
A If he thought he was goin' back to the penitentiary, yes, he would.

Q And, you're his source of advice?
A Sometimes.
Q Why do you suppose he called on you?
A I don't know.
Q Why didn't you just tell them to go back home and keep you out of it?
A "Butch" is my friend, and he wanted to talk to me and so I went with him.
Q Randy isn't your friend, is he?
A No, he isn't.
Q So, you would do most anything to help your friend, "Butch"?
A It depends.
Q Including testifying against Randy—makin' up this wild story?
A I ain't makin' up no story, Mr. Parkinson; I'm tellin' the truth.
Q MR. PARKINSON: May we approach the bench?
THE COURT: You may.
[Vol. VII, 124] (Discussion out of the hearing of the jury:
THE COURT: All right, Gentlemen. It's not proper for the State to develop on cross examination of a witness who remained silent during interrogation that he had not told police about matters he testified to during trial. Requiring the defendant to testify what he told to police is inconsistent with the 5th and 14th Amendments—*People v. White*, 53 Ill. Ap. 3 326.
MR. PARKINSON: Thank you.
THE COURT: Sustain the objection/
MR. LEEFERS: Mistrial?
THE COURT: No mistrial.
MR. LEEFERS: Thank you, Your Honor.)
Q MR. PARKINSON: When this was all over for this whole several hours, did you ever bother to inquire where the body was?

A I did once. I asked "Butch" in the house, what they done with the guy, and "Butch" said they'd got rid of him.

Q Okay; you stuck pretty close to a guy you weren't friends with for about 20 hours, didn't you?

A Yes.

Q That's Randy?

A Yes, sir.

Q Were you afraid he'd talk?

[Vol. VII, 125] A No, sir.

Q Did you have the same worry that "Butch" told you, that he wasn't sure about Randy?

A No, sir, I didn't.

Q You weren't too sure about Randy, either, were you?

A I don't know Randy. The reason why I was with Randy, he was a'payin' for the drinks and he was payin' for everything. I didn't have the money, and he was payin'.

Q You'd never been to Dottie's Cafe in your life, had you?

A Yes, I'd been there before, before Mrs. Williams owned it.

Q But, after Mrs. Williams owned it, you'd never been there to eat, had you?

A No, sir.

Q And you drank beer with and hung around Randy Williams for almost 20 hours?

A Yes, sir.

Q A guy that's not your friend?

A Yes, sir.

Q Afraid he'd go to the police?

A No, sir.

MR. PARKINSON: No other questions.

THE COURT: Thank you.

* * * * *

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
MORGAN COUNTY, ILLINOIS

(Title Omitted in Printing)

Closing Argument by Mr. Parkinson.

* * * * *

[Vol. VII, 173] We furnished you with an eye-witness to the crime. They make a big deal out of Randy Williams is a confessed kidnapper; that, he is.

However, Randy Williams got a deal; he got the charges of murder dropped against him. If you believe Randy Williams, he didn't kill him, though. You bet he didn't; he shot at a dead body. If anything, he missed the dead body once. In any event, the body of Neil Gorsuch was already dead. Yes, he got a deal. He pled guilty to a felony of kidnapping. He's got to face that, still in jail. He's got to face the court sentencing on that later.

Without Randy Williams, "Chuck" Miller wouldn't be in this court today, would he? Didn't hear from "Butch" Armstrong coming up here to testify about his good buddy, did you? The State is willing, defense counsel will argue to you, to make a deal with this Randy Williams, a confessed kidnapper and murderer, just to get "Chuck" Miller.

We made a deal, if you want to call it that, with a guy who's willing to tell the truth, a man who told the truth of his involvement on February 10, 1980. Sure, he was wrong in [Vol. VII, 174] details; sure, he left some things out; sure, his statement is confusing; sure, he lied at that time about not being with his brother as they left the Regulator Tavern at first, but he was in custody only a

few hours. He was charged with murder. He knew they had him, cold turkey, but he told them a story, as they call it, an account, as I call it, shortly after his arrest, factually corroborated by an independent investigator.

So, if you call that a deal, put that aside. The question is, deal or no deal, did Randy tell you the truth? It really boils down to, who told you the story here and who told you the truth? You either believe Randy Williams or you believe "Chuck" Miller. That is your choice. It's as simple as that.

* * * * *

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
MORGAN COUNTY, ILLINOIS

(Title Omitted in Printing)

* * * * *

People's Instruction #1
I.P.I. 1.01 (Given)

[C 368] Members of the jury, the evidence and arguments in this case have been completed, and I will now instruct you as to the law.

The law applicable to this case is stated in these instructions and it is your duty to follow all of them. You must not single out certain instructions and disregard others.

It is your duty to determine the facts, and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case.

Neither sympathy nor prejudice should influence you. You should not be influenced by any person's race, color, religion or national ancestry.

From time to time it has been the duty of the court to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You should disregard questions and exhibits which were withdrawn or to which objections were sustained.

You should also disregard testimony and exhibits which the court has refused or stricken.

The evidence which you should consider consists only of the testimony of the witnesses and the exhibits which the court has received.

Any evidence which was received for a limited purpose should not be considered by you for any other purpose.

You should consider all the evidence in the light of your own observations and experience in life.

Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be.

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
MORGAN COUNTY, ILLINOIS

(Title Omitted in Printing)

Excerpt of Trial Court's Ruling on Motion to Determine Attorney's Fees

* * * * *

[Vol. XI, 62] Nothing complex about the trial; the trial, actually, was a swearing match. You had two witnesses, when you get right down to it. All of the rest was dressing—the pathologists, all of the police officers that made the investigation out at the scene and took the photographs at the scene, that did the investigation. Any time they find a dead body like that, they do the same thing, whether it's a suicide or a murder. Sometimes those investigating routines uncover other things that lead to other things, that lead to other things that eventually lead to the conviction of a defendant.

[Vol. XI, 63] Not necessarily so in this case. In this case, without the quote, swearing match, unquote, there was no way that the State was going to convict Mr. Armstrong or this defendant, Miller. You had to have Mr. Williams's testimony, so it boils down to a swearing match; which was the jury going to believe?

Fortunately for the State, they believed their witness. Unfortunately for the defendant, they believed their witnesses. Could have gone just the very opposite.

* * * * *

(4)

No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES GREER, Warden,
Menard Correctional Center,

Petitioner,

vs.

CHARLES "CHUCK" MILLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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50 pp

QUESTIONS PRESENTED FOR REVIEW

I. Should violations of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976) be reviewed under a less stringent standard than that established by *Chapman v. California*, 386 U.S. 18 (1967) in light of the fact that *Doyle* is a due process case, and claims of a denial of due process are subject to a general requirement that actual prejudice be shown?

II. Should *Chapman v. California*, 386 U.S. 18 (1967) be applied at all in federal habeas corpus proceedings, where the cost of strictly enforcing constitutional rights outweighs the benefits?

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BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

Certiorari was granted to review the *en banc* decision of the United States Court of Appeals for the Seventh Circuit in *United States ex rel. Miller v. Greer,* 789 F.2d 438 (7th Cir. 1986) (*en banc*), reprinted as Appendix A to the petition for a writ of certiorari. The panel decision, *United States ex rel. Miller v. Greer,* 772 F.2d 293 (7th Cir. 1985), is reprinted as Appendix B. The opinion of the district court, *United States ex rel. Miller v. Greer,* No. 83-3254 (C.D. Ill.), which is not reported, is reprinted

as Appendix C. The opinion of the Illinois Supreme Court is reported in *People v. Miller*, 96 Ill. 2d 385, 450 N.E. 2d 322 (1983) and reprinted as Appendix D. The opinion of the Illinois Appellate Court is reported in *People v. Miller*, 104 Ill. App. 3d 57, 432 N.E.2d 650 (4th Dist. 1982) and reprinted as Appendix E.

STATEMENT OF THE CASE

A. Introduction

Early on the morning of Saturday, February 9, 1980, Neil Gorsuch was killed by two shotgun blasts to the head at the Markham Bottoms bridge over Mauvaisterre Creek in rural Morgan County, Illinois. His body was discovered later that afternoon, partially submerged in the frozen creek. (Vol. V, 46-47) Randy Williams, a suspect in the case, was arrested the next morning while sitting in a borrowed car at a gas station. (Vol. IV, 28-29) Respondent Miller was with him at the time. He was not then a suspect, but he was also arrested when a pistol was found under the front seat of the car. (Vol. IV, 35-36) He was held for unlawful use of weapons. (Vol. IV, 51)

Once in custody, Randy Williams gave a statement implicating himself, respondent, and Clarence "Butch" Armstrong in the murder of Neil Gorsuch. (Vol. III, 18-23; Vol. IV, 60) All three were charged on February 11, 1980, with murder, kidnapping, aggravated kidnapping, and armed robbery. (C. 2-5; Vol. III, 29)

Because of antagonistic defenses, respondent's case was severed from the others and separate counsel were appointed. (Vol. II, 1-3) Randy Williams negotiated an agreement with the prosecution whereby, in exchange for his testimony at the trials of respondent and Armstrong, he

would plead guilty to kidnapping and the other charges would be dropped. (J.A. 6-7) Respondent's jury trial began on June 2, 1980, and lasted five days.

B. The Facts Underlying The Conviction

Randy Williams testified that on Friday night, February 8, 1980, he and his brother Rick borrowed a car from Rick's girlfriend, Chris Peterson, and went with Butch Armstrong to the Regulator, a tavern in Jacksonville, Illinois. (Vol. VI, 220-221) There they encountered Neil Gorsuch, who came to their table and spoke with them periodically. (Vol. VI, 222) Gorsuch was from Littleton, Illinois (Vol. III, 14), and had checked into the Motel 6 in Jacksonville earlier that day. (Vol. VIII, 47-48) At approximately 11:00 p.m., he called for a cab and was taken to the Regulator. (Vol. VIII, 114-115) When the Regulator closed at 1:30 a.m. on the morning of February 9, 1980, Gorsuch purchased a 12-pack of Busch beer from the bartender (Vol. VIII, 74), and left with the Williams brothers and Armstrong. (Vol. VI, 223) One of the waitresses testified that he was quite drunk. (Vol. VIII, 60)

Rick and Randy Williams both testified that the four men got into the car, and Rick drove to Chris Peterson's house where he got out. (Vol. VI, 168, 224) Chris Peterson testified that it was approximately 1:45 a.m. when Rick came home. (Vol. VI, 137) Randy took over behind the wheel, with Neil Gorsuch and Butch Armstrong in the back seat, and drove around town for a while. (Vol. VI, 224-225) During this time, Armstrong began beating Gorsuch. (Vol. VI, 225) Gorsuch said "he didn't mean to put his hand on Butch's leg" and pleaded with Armstrong to stop hitting him, but the beating continued. (Vol. VI, 495)

Randy drove to his house where all three got out of the car. (Vol. VI, 226) Armstrong had placed a stocking

cap on Gorsuch's head and pulled it down around his neck. He led Gorsuch by the arm into the house (Vol. VI, 227), and Randy brought in the 12-pack of Busch beer. (Vol. VI, 234) Gorsuch had defecated in his pants (Vol. VI, 231), so Armstrong sent him into the bathroom to clean up. (Vol. VI, 227) While Gorsuch was in the bathroom, Armstrong retrieved a shotgun from the closet and propped it up against the doorway in the dining room. He also took some shotgun shells from a box on top of the dresser, and a .32 pistol with one live round from the kitchen table, and put them in his coat pocket. (Vol. VI, 228-229) When Gorsuch came out of the bathroom, the stocking cap was still pulled down over his face. (Vol. VI, 232) Armstrong berated him for leaving feces on the bathroom floor, and then struck him in the back of the head with the butt of the shotgun. Gorsuch fell across a chair in the kitchen and hit his head on the table. Blood from the resulting wound ran onto the floor. (Vol. VI, 232-233)

All three men left Randy's house and got into the car. Gorsuch still had the stocking cap over his head, and Armstrong had him lay down on the back seat. Armstrong got into the front passenger seat carrying the shotgun, and Randy drove, following Armstrong's directions. (Vol. VI, 236-238, 241) At one point, Gorsuch sat up and asked to be taken to Motel 6, and Armstrong fired a shot from the .32 pistol into the back seat. (Vol. VI, 241, 496)

They eventually arrived at the Blue Ridge trailer court, and Armstrong directed Randy to stop at the trailer owned by Debbie Elliott. (Vol. VI, 242-243; Vol. VIII, 136) Randy stopped and shut the engine off, and Armstrong went in. (Vol. VI, 243) He came out a little while later, and shortly afterward respondent came out. (Vol. VI, 244-245) Several people who were in the trailer testified at trial that Armstrong arrived early on the morning of February 9, spoke briefly with respondent, and then left with him. (Vol. VI, 7-8; Vol. VIII, 140-141, 158-159, 171) Estimates as to the

time varied from 4:15 a.m. (Vol. VI, 8) to 6:30 a.m. (Vol. VIII, 182-183), but Teresa McDade was the only one who looked at a clock. (Vol. VIII, 160) She testified that it was 5:30 a.m. (Vol. VIII, 158)

With Armstrong in the front seat and respondent in the back with Gorsuch, Randy drove off, again following Armstrong's directions. (Vol. VI, 245, 247) Respondent asked Gorsuch if he had any money, and when Gorsuch replied that he did, respondent hit him and began going through his pockets. (Vol. VI, 252-253) Armstrong yelled that Gorsuch "was a dead man now", and said that "we was all three goin' to shoot this man." (Vol. VI, 254-255)

When they crossed the Markham Bottoms bridge Armstrong told Randy to stop. (Vol. VI, 255) As they got out of the car, Armstrong handed the shotgun to respondent and then pulled Gorsuch by the arm out of the back seat of the car. (Vol. VI, 257-259) He led Gorsuch to the rail of the bridge and pulled off the stocking cap. (Vol. VI, 259) Respondent then shot him in the back of the head. He fell, draped over the rail. (Vol. VI, 259-261) Respondent handed the shotgun to Armstrong, who reloaded it and fired, also hitting Gorsuch in the head. (Vol. VI, 260) Armstrong reloaded again and handed the shotgun to Randy, saying "Randy, you gotta' shoot this man, too, or we'll bury you with him." (Vol. VI, 261) Randy fired but missed. He opened the barrel of the gun and the shell ejected, hitting him in the chest and rolling under the bridge. (Vol. VI, 263) Armstrong threatened him again, reloaded, and handed the gun back to him. (Vol. VI, 262) He fired again, but was not sure if he hit the body. (Vol. VI, 263-264) Armstrong then flipped the body by the feet over the rail and into the creek. (Vol. VI, 264) Randy picked up three of the shells—the one that rolled under the bridge was left behind—and handed them to Armstrong. (Vol. VI, 264-265) They got back into the car and headed towards town. Along the way, respondent read aloud Gorsuch's name and

home town from his driver's license, and then threw the license, the billfold, and the shotgun shells out the window. (Vol. VI, 265-267)

Randy drove back to his house and put the shotgun in the living room. Then he took Armstrong home and dropped him off. (Vol. VI, 268) From there, he drove with respondent to his mother's restaurant, Dottie's Cafe. (Vol. VI, 269) Mrs. Williams testified that they arrived at approximately 6:15 a.m., drank coffee, and ate breakfast. (Vol. VI, 117-118) Randy drove respondent back to Debbie Elliott's trailer, and then returned to his mother's cafe. (Vol. VI, 271)

The body was discovered later that afternoon, at about 2:00 p.m. (Vol. V, 46-47) The Sheriff's Department was called (Vol. V, 55), and the coroner and deputy coroner arrived. (Vol. V, 62, 74-75) A Motel 6 matchbook and a key to room 80 were found near the body, and a .12 gauge shotgun shell was found under the bridge. (Vol. V, 66, 105, 107; Vol. VI, 18) There was a large amount of blood on and under the bridge. (Vol. V, 63) The body was taken to Passavant Hospital, and from there to Springfield Memorial Hospital, where an autopsy was performed two days later, on Monday, February 11, 1980. (Vol. V, 64, 79, 139) The time of death could not be determined because no one had taken a core temperature of the body at the scene. (Vol. V, 139-140) The cause of death was determined to be either of two contact or near-contact gunshot wounds to the head. (Vol. V, 150-152)

After he left his mother's cafe the second time, Randy Williams went to Bahan's, a tavern in Jacksonville. He was joined there that afternoon by respondent and Armstrong. (Vol. VI, 271-272) The three of them went to Randy's house to straighten up and wipe the blood stain from the dining room floor, after which they returned to Bahan's. (Vol. VI, 272-275) Armstrong went home a short time later. (Vol. VI, 276)

Rick Williams, his girlfriend Chris Peterson, and his mother and father came into Bahan's that afternoon, and went with Randy and respondent to Andy's, another tavern, for supper. (Vol. VI, 138, 169-170, 276-277) On the way over, Randy told Rick that he was "in big trouble" and needed to talk to him. (Vol. VI, 277) Rick, Randy, respondent, and Chris Peterson left Andy's and went to Randy's house. (Vol. VI, 170, 278) Rick and Randy stepped into the bedroom, and respondent followed them in. (Vol. VI, 171, 279) Chris Peterson remained in the dining room. (Vol. VI, 140-141) Randy told his brother that he, Armstrong, and respondent had killed the man they left the Regulator with the night before. (Vol. VI, 279-280) Rick and Randy both testified that respondent also said they had killed the man. (Vol. VI, 173, 280) Respondent added that Rick "better be quiet about it." (Vol. VI, 174) Randy suggested that if any of them were asked by the police about the incident, they should say that they left Gorsuch at the Regulator. (Vol. VI, 173)

Respondent left with Randy Williams in Chris Peterson's car, and they went to Harold's Club, another tavern. (Vol. VI, 280) The next morning, Sunday, February 10, 1980, they were arrested together at the Derby gas station at approximately 5:00 a.m. (Vol. IV, 44; Vol. VI, 281-282)

A .32 pistol was found on the floor of the car at the time of the arrest. (Vol. VIII, 106-107) Randy Williams made a statement within hours of his arrest implicating himself, respondent, and Armstrong. (Vol. IV, 60-61) Based on the information obtained from Randy, Sheriff's Deputies recovered a spent .32 caliber slug, a blood-stained piece of paper, and hair samples from the back seat of Chris Peterson's car (Vol. V, 134-135; Vol. VIII, 6-8); a blood-stained Busch beer 12-pack container from Randy's living room and a .12 gauge shotgun and some live shells from his bedroom (Vol. VI, 59; Vol. VII, 8; Vol. VIII, 6, 8-9); and three spent .12 gauge shells and Neil Gorsuch's driver's

license from the roadside about two miles from the Markham Bottoms bridge. (Vol. VIII, 11, 16) The .32 slug was found to have been fired from a gun having the same class characteristics as the pistol taken during the arrest, and the spent shells recovered from under the bridge and along the roadway were found to have been fired from the shotgun seized in Randy's bedroom. (Vol. VI, 70-73, 76-85) The hair sample taken from the car was determined to be consistent with standards taken from Neil Gorsuch (Vol. VI, 40-42), and the blood on the paper and the beer container was the same type as Gorsuch's, Type O. (Vol. VI, 46-47)

Respondent testified on his own behalf, and stated that when Butch Armstrong picked him up at Debbie Elliott's trailer, Neil Gorsuch was already dead. According to respondent, Armstrong told him he was in trouble and needed his advice. (J.A. 9) They left the trailer and got into the car with Randy Williams, and while they were driving around, Armstrong said that he and Randy had killed a man they picked up at the Regulator. (J.A. 10-11) Respondent asked why they killed him, and Armstrong said they had beaten him up and were afraid he would go to the police. (J.A. 13)

They drove to Randy's house, where Randy cleaned up the bathroom and a bloodstain on the dining room floor. (J.A. 11-12) Respondent asked what they had used to kill the man, and Randy Williams showed him a pair of "numchucks"—two wooden sticks linked at the ends with a cord. (J.A. 13-14) Since Randy's brother Rick was with them when they left the Regulator, Armstrong said that Rick should be told about the murder and warned to deny ever being in the company of the victim. (J.A. 14)

They got in the car and drove Butch Armstrong home. On the way, Armstrong asked respondent not to say anything about the murder to anyone, and respondent promised that he would not. (J.A. 15) After dropping Armstrong off, Randy and respondent drove to Dottie's Cafe for breakfast. (J.A. 16) From there, Randy drove respondent back to the trailer court. (J.A. 17)

Later that evening, respondent was with Rick and Randy Williams, their parents, and Chris Peterson at Bahan's, and from there they all walked over to Andy's. (J.A. 22-23) Respondent left Andy's with Rick, Randy, and Chris, and went to Randy's house. (J.A. 24) Rick and Randy left respondent and Chris in the dining room, and went into the bedroom to talk privately. Respondent joined them a few minutes later. Randy was telling Rick about the murder of Neil Gorsuch. Respondent said nothing. (J.A. 25) When they left the bedroom, Randy gave a demonstration of the use of numchucks. (J.A. 26) Afterwards, respondent and Randy went to Harold's Club, and from there to a party at a friend's house. (J.A. 26-27) They ended up at the Derby gas station, where they were both arrested. (J.A. 29)

The cross-examination of respondent began as follows:

Q. Mr. Miller, how old are you?

A. 23.

Q. Why didn't you tell this story to anybody when you got arrested?

MR. LEFFERS: Objection, Your Honor. May we approach the bench?

THE COURT: You may.

(Whereupon the following colloquy ensued out of the hearing of the jury:

MR. LEFFERS: Your Honor, I think this is an infringement of his exercise of his right to remain silent. At this point in time, I will ask for a mistrial—

THE COURT: What do you say, Mr. Parkinson?

MR. PARKINSON: Well, he has taken the stand and he is open to cross examination extensively. He is entitled to be questioned by the State as to why he

didn't talk to anybody about it at the time. It goes to his credibility and I don't think it's an improper question.

THE COURT: Have you got a case that says it's improper?

MR. LEFFERS: No, Your Honor. I didn't think Mr. Parkinson would ask that question, quite frankly.

THE COURT: I will deny your mistrial, your motion for mistrial, but I will sustain your objection. The jury will be instructed.

MR. LEFFERS: And that Mr. Parkinson desist.

THE COURT: I will do some checking during the time he is on the witness stand on Cross Examination and if I find where he can, I will let him ask the question.)

The objection will be sustained and the jury will be instructed to ignore that last question, for the time being.

You may continue, Mr. Parkinson.

(J.A. 31-32) At a later sidebar conference, the trial court indicated that it had found authority prohibiting that line of questioning (J.A. 43), and the prosecutor did not thereafter pursue it, or argue the matter to the jury in closing. At the end of the case, the jury was instructed to "disregard questions . . . to which objections were sustained." (J.A. 47)

The jury deliberated for six hours. (C. 12) Two hours into their deliberations, they sent a note to the trial court asking for the testimony of the witnesses establishing the time of respondent's arrival and departure from Debbie Elliott's trailer, and placing Armstrong at Bahan's on the afternoon of February 9, 1980. Counsel were consulted, and it was agreed that these questions should not be answered. (Vol. VII, 231) Verdicts were returned finding respondent guilty of murder, kidnapping, aggravated kidnapping, and robbery. (Vol. VII, 232)

C. The Post-Trial Proceeding

The State sought the death penalty, and a hearing was convened before the same jury that had determined respondent's guilt. (Vol. X, 3) At the conclusion of the hearing, the jury recommended imprisonment. (Vol. X, 81)

At the hearing on the post-trial motion, respondent argued that he was entitled to a new trial for several reasons, one being that the prosecutor's cross-examination violated the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976). (Vol. XI, 4-6) The trial court denied the motion, ruling on the *Doyle* issue that "I don't think it was error for the State to ask the question that was asked. The defendant's attorney immediately objected; the objection was sustained and maybe even erroneously, now, so that will be denied." (Vol. XI, 15) Respondent was sentenced to concurrent terms of eighty years for murder, thirty years for aggravated kidnapping, and seven years for robbery. (Vol. XI, 42) The kidnapping conviction was vacated. (Vol. XI, 16)

D. Direct And Collateral Review

The Illinois Appellate Court reversed respondent's convictions and remanded for a new trial, finding that the prosecutor's cross-examination violated the rule of *Doyle*. Applying *Chapman v. California*, 386 U.S. 18 (1967), the appellate court was unable to find the error harmless beyond a reasonable doubt because it characterized the trial as "essentially a credibility contest" between respondent and Randy Williams, and the reference to respondent's post-arrest silence "may have irreparably prejudiced him in the eyes of the jury." (App. to Pet. for Cert. at E-7) The State sought review in the Illinois Supreme Court, which reversed the appellate court, with one judge dissenting. Initially, the court rejected the State's argument that *Doyle* was inapplicable because the record did not reflect that respondent had been informed upon arrest of

his right to remain silent. It found that a police report contained in the common law record (C. 556) showed respondent was informed of his rights at the time of his arrest on the murder charge. (App. to Pet. for Cert. at D-8-9) On the harmless error question, the court determined that the State had satisfied its burden under *Chapman* since the error was a single, isolated incident during a five-day trial and the evidence was sufficient to support the verdict. (App. to Pet. for Cert. at D-10-11)

Respondent then petitioned for federal habeas corpus relief. After reviewing the record and applying the *Chapman* standard, the district court found the error harmless beyond a reasonable doubt (App. to Pet. for Cert. at C-4), but a panel of the Court of Appeals, in a split decision, disagreed. It held that for an error to be harmless under *Chapman*, the evidence of guilt must be overwhelming. (App. to Pet. for Cert. at B-7) The majority of the panel found that the evidence did not meet this standard because Randy Williams' testimony on the critical issue—whether he and Armstrong picked up respondent at the trailer court before or after Gorsuch was killed—was uncorroborated. (App. to Pet. for Cert. at B-8-9)

En banc rehearing was granted to consider whether *Chapman* is the appropriate standard of review for violations of *Doyle*. Eight members of the Court of Appeals agreed that it was, and five agreed that the error in this case was not harmless beyond a reasonable doubt. Chief Judge Cummings, with Judges Wood and Coffey, dissented, stating their agreement with the majority of the Illinois Supreme Court. (App. to Pet. for Cert. at A-17-18) Judge Easterbrook found no fault with the majority's conclusion that the error here was not harmless if judged by the *Chapman* standard, but dissented on the ground that *Chapman* should not apply to violations of *Doyle*, particularly on collateral review. (App. to Pet. for Cert. at A-19-35) Petitioner Greer sought a writ of certiorari, which this Court granted on December 1, 1986.

SUMMARY OF ARGUMENT

I. *Doyle v. Ohio*, 426 U.S. 610 (1976) holds that when a criminal defendant testifies on his own behalf at trial, the prosecution may not use his silence at the time of arrest and after receipt of *Miranda* warnings for impeachment purposes. Violations of *Doyle* are universally reviewed by applying *Chapman v. California*, 386 U.S. 18 (1967), the most stringent harmless error standard, but no court has ever explained why the *Chapman* standard is necessarily the correct one. *Doyle* stems from the Due Process Clause, and claims of a denial of due process are subject to a general requirement that the defendant demonstrate actual prejudice.

A. *Chapman* deals solely with errors affecting specific constitutional provisions, and holds that while some errors of this nature can never be harmless, many are not sufficiently important to justify reversal in every case. In the first category are errors affecting rights, such as the right to trial before an impartial tribunal, which are necessary to the integrity of the factfinding process. In the second category are errors affecting rights, such as the right to remain silent, which do not necessarily disable the factfinding process from achieving its goal of accurate adjudication. A third category of constitutional error, not dealt with in *Chapman*, involves claims based on a fact or a set of facts which do not implicate specific constitutional provisions, but which are said to result in a denial of fundamental fairness in violation of the Due Process Clause. Some claims of this type involve intolerably reprehensible conduct on the part of governmental officials. Others involve circumstances which give rise to an unacceptable risk of inaccurate adjudication. No prejudice need be shown to justify reversal in cases of this type. In most cases arising solely under the Due Process Clause, how-

ever, an error will not be found to rise to the level of constitutional error unless actual prejudice is shown. Actual prejudice is incorporated into the definition of an error which violates due process. This analysis does not involve application of any harmless error standard of review. To demonstrate prejudice, a defendant must show that there is a reasonable probability that, absent the error, the result of the proceeding would have been different.

B. The decision in *Doyle* stems from the Due Process Clause, not the Fifth Amendment, and rests on two premises. The first is that silence at the time of arrest is not probative of the veracity of exculpatory trial testimony. This rationale is not of constitutional dimension, and has been abandoned in subsequent cases. The second premise is that *Miranda* warnings implicitly promise the arrestee that silence will carry no penalty, and it is unfair to so induce silence at the time of arrest and then use it for impeachment purposes at trial. The Court has explicitly held that this rationale is not grounded in the Fifth Amendment.

C. *Chapman* does not apply to violations of *Doyle* because *Doyle* is a due process case, not a Fifth Amendment case. Furthermore, respondent should be required to show actual prejudice because *Doyle* does not involve intolerably reprehensible conduct, nor does it inherently undermine the factfinding process.

II. *Chapman* should not apply at all in federal habeas corpus proceedings because in balancing the interests which compete with the need to enforce constitutional rights strictly, *Chapman* does not take into account the unique and heavy costs associated with collateral review. Since the sole concern of the writ of habeas corpus is the fundamental fairness of the judgment by which the State seeks to maintain an individual in custody, habeas corpus applicants should be required to show actual prejudice regardless of the nature of the claim.

A. The rights afforded by the Constitution serve not only the interests in protecting the innocent against a miscarriage of justice, but also the broader societal interests in individual autonomy and personal privacy. *Chapman* serves to protect the full spectrum of constitutional values, as evidenced by the clear distinction between the standard of harmless error review for constitutional errors as opposed to nonconstitutional errors. Moreover, *Chapman* balances these values against the limited interests which compete on direct review with strict enforcement of constitutional rights.

B. On collateral review, not only do the interests which always compete with strict enforcement of constitutional rights take on greater importance, but additional interests come into play as well. Federal habeas corpus review of state court judgments raises important questions concerning federalism, comity, and finality. When these factors are taken into account, the only interest sufficient to outweigh them is the interest in protecting the innocent against an unjust incarceration. Thus, a prerequisite for habeas corpus relief should be a showing by the applicant that, had the error complained of not occurred, there is a reasonable probability that the outcome would have been different. This standard of review for collateral attacks on state court judgments precludes application of *Chapman*.

III. When the appropriate standard of review is applied to respondent's claim, it is clear that he is not entitled to habeas corpus relief. Crucial to his ability to show a reasonable probability that the outcome would have been different had the *Doyle* error not occurred is his ability to show that there was a compelling reason for the jury to disbelieve Randy Williams. Otherwise it cannot be said that only the *Doyle* error accounts for the jury's choice. The record does not support this assertion. Williams was never shown to have a grudge against re-

spondent, and although he negotiated a favorable plea agreement in exchange for his testimony, his accusation of respondent predated the agreement by more than three months. He had no reason to falsely accuse respondent at that time. Moreover, there was considerable corroboration for Williams' testimony, and the trial judge's conditional curative instruction was later supplemented by a general instruction to disregard questions to which objections were sustained.

ARGUMENT

I.

THE HARMLESS ERROR DOCTRINE OF *CHAPMAN v. CALIFORNIA* DOES NOT APPLY TO VIOLATIONS OF THE RULE OF *DOYLE v. OHIO* BECAUSE THE RULE STEMS FROM THE DUE PROCESS CLAUSE, AND CLAIMS OF A DENIAL OF DUE PROCESS ARE SUBJECT TO A GENERAL REQUIREMENT THAT ACTUAL PREJUDICE BE SHOWN.

The prosecutor's second question on cross-examination of respondent was "[w]hy didn't you tell this story to anybody when you got arrested?" (J.A. 31) Before respondent could answer, defense counsel raised an objection and a sidebar conference was held, after which the trial judge informed the jury that "[t]he objection will be sustained and the jury will be instructed to ignore the last question, for the time being." (J.A. 32) Because respondent had been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) at the time of his arrest for the murder of Neil Gorsuch (C. 556), petitioner acknowledges that this effort to impeach respondent with his prior silence constituted an attempted violation of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle*, this Court held that when a criminal defendant testifies at his trial, the prosecution may not use his silence at the time of arrest and after receipt of *Miranda* warnings to impeach him. The use of post-*Miranda* warnings silence for impeachment purposes, according to *Doyle*, "violate[s] the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. Adding that the State of Ohio had not raised the possibility that the error was harmless, the Court reversed. *Id.* at 619-620. Since then, every circuit that has considered whether a violation of the rule of *Doyle* requires reversal has assumed that the harmless error doctrine applies, and has selected the most exacting harmless error rule as the standard of review—that established by *Chapman v. California*, 386 U.S. 18 (1967). (*See* App. to Pet. for Cert. at A-7) Not one explains why *Chapman* necessarily supplies the appropriate standard. *See Phelps v. Duckworth*, 772 F.2d 1410, 1421 (7th Cir. 1985) (*en banc*) (EASTERBROOK, J., concurring).

The decision in *Doyle* is based on the Due Process Clause, and, as discussed in Argument I.A, this Court's treatment of cases arising under the Due Process Clause does not involve the application of harmless error standards of review. Rather, this Court looks to the nature of the error complained of to determine whether it involves conduct which is so offensive to basic notions of fairness that it cannot be tolerated in a civilized society, or poses such a threat to the ability of the factfinding process to achieve reliable results that it is inherently prejudicial. If so, the error cannot be found harmless. If not, then the defendant must show that actual prejudice resulted in the sense that there is a reasonable probability that, had the error not occurred, the result of the proceeding would have been different. Arguments I.B and C address the points that *Doyle* is a due process case, and that because violations of *Doyle* do not involve gross unfairness or inherent prejudice respondent should be re-

quired to demonstrate actual prejudice. The Court of Appeals' application of the stringent *Chapman* standard was therefore erroneous.

A. The Definition Of Errors Resulting In A Denial Of Due Process Incorporates A General Requirement That The Defendant Show Actual Prejudice, Thus Making *Chapman* Inapplicable As A Standard Of Review In Due Process Cases.

If anything is clear from this Court's decisions on constitutional issues in criminal cases, it is that "claims of constitutional error are not fungible." *Rose v. Lundy*, 455 U.S. 509, 543 (1982) (STEVENS, J., concurring in the judgment). The standard of review varies according to the nature of the claim and the constitutional right which is implicated. *Chapman* deals solely with errors affecting specific constitutional provisions,[1] and it identifies two types: errors affecting rights which are of such fundamental importance, either to the integrity of the factfinding process or to basic notions of fairness in a free society, that no judgment can stand in any case where those rights have been abridged; and errors affecting rights which are not sufficiently important to justify reversal in every case. As examples of the first category, *Chapman* cites *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel), *Payne v. Arkansas*, 356 U.S. 560 (1958) (use of coerced confession), and *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial before judge with financial interest in the outcome). 386 U.S. at

[1] The specific constitutional provisions contained in the Bill of Rights are, of course, applicable to the states only through the Due Process Clause of the Fourteenth Amendment. By drawing a distinction between errors implicating specific constitutional provisions and those affecting only the right to due process, petitioner does not mean to suggest that there should be an artificial distinction between the analysis of constitutional errors in state cases as opposed to federal cases. Rather, the distinction is between errors affecting rights which have their basis in specific constitutional provisions and those which do not.

23, n. 8. To this list, *Vasquez v. Hillery*, 106 S.Ct. 617 (1986) (racial discrimination in selection of grand jury), and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (directed verdict for prosecution in a criminal jury trial) have been added.

Chapman places the Fifth Amendment right to remain silent in the second category. In *Chapman* itself, the prosecutor had asked the jury to infer guilt from the defendant's failure to testify and exculpate himself, in violation of the Fifth Amendment as construed in *Griffin v. California*, 380 U.S. 609 (1965); this Court held that such an error does not require reversal if the State can prove beyond a reasonable doubt that it was harmless. 386 U.S. at 24. *See also United States v. Hastings*, 461 U.S. 499 (1983) (comments on defendants' failure to testify held harmless beyond a reasonable doubt). The harmless error standard of *Chapman* has since been held to apply to a variety of constitutional errors, all stemming from specific constitutional provisions. *Rose v. Clark*, 106 S.Ct. 3101 (1986) (Sixth Amendment right to jury determination of factual issues); *Delaware v. Van Arsdall*, 106 S.Ct. 1431 (1986) (Sixth Amendment right to confrontation); *Rushen v. Spain*, 464 U.S. 114 (1983) (per curiam) (Sixth Amendment right to be present at trial); *Moore v. Illinois*, 434 U.S. 220 (1977) (Sixth Amendment right to counsel at post-indictment identification procedure); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (arrest in violation of Fourth Amendment); *Milton v. Wainwright*, 407 U.S. 371 (1972) (confession obtained in violation of Sixth Amendment right to counsel); *Chambers v. Maroney*, 399 U.S. 42 (1970) (evidence obtained in violation of Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1 (1970) (Sixth Amendment right to counsel at preliminary hearing).

A third type of constitutional error not dealt with in *Chapman* involves claims based on a fact or a set of facts which do not implicate specific constitutional provisions,

but which are said to result in a denial of fundamental fairness in violation of the Due Process Clause. Some errors of this type require reversal regardless of their impact on the process of adjudication because they involve conduct on the part of government officials so reprehensible that it cannot be tolerated in a civilized society. *Rochin v. California*, 342 U.S. 165 (1952).[2] Others require reversal whether or not any identifiable prejudice has resulted because they give rise to an unacceptable risk that the adjudication of guilt or innocence was inaccurate. *Estelle v. Williams*, 425 U.S. 501 (1976) (accused forced to trial before a jury while wearing prison garb, found inherently prejudicial because it deprived him of the presumption of innocence); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (accused tried in a courtroom dominated by the media, creating a circus atmosphere); *Drope v. Missouri*, 420 U.S. 162 (1975) (accused tried while mentally incompetent).

In most cases arising solely under the Due Process Clause, however, the defendant must show actual prejudice in order to obtain reversal. When errors are alleged which do not implicate specific constitutional guarantees, then prejudice must be shown in order to elevate them to the level of a constitutional violation. Actual prejudice, then, is incorporated into the definition of errors amounting to a violation of due process. Thus, in *United States v. Bagley*, 105 S.Ct. 3375, 3380-3381 (1985), this Court held that a prosecutor's breach of his duty under *Brady v. Maryland*, 373 U.S. 83 (1963) to turn over discoverable information in response to a valid request does not violate due process unless the defendant can show that the information was material in the sense that it gives rise

[2] *Rochin* was actually a case that involved Fourth Amendment concerns, but the Due Process Clause was invoked as the basis for reversal because the exclusionary rule had not yet been applied to the states.

to a reasonable probability that the outcome would have been different. *Cf. United States v. Agurs*, 427 U.S. 97, 104 (1976) (". . . implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."). This degree of materiality of the withheld information is an essential component of a due process claim. The same standard was applied in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982), where the Court held that due process is violated by government deportation of witnesses favorable to the defendant only when he can show that their testimony would give rise to reasonable likelihood that the judgment would have been different. Similarly, when the police use suggestive identification procedures, the defendant must show, first, that the procedure was unnecessarily suggestive, *Simmons v. United States*, 390 U.S. 377, 389 (1968), and second, that there is a reasonable likelihood that the procedure led to misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 113-114 (1977); *Neil v. Biggers*, 409 U.S. 188, 198-199 (1972). Actual prejudice must also be shown when the jury has been given an erroneous instruction, or no instruction, on a necessary element of the offense. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973).[3] Prosecutorial misconduct in closing argument, even of the most egregious sort, does not violate due process absent a showing of actual prejudice. *Darden v. Wainwright*, 106 S.Ct. 2464, 2471-2473 (1986); *Donnelly v. DeChristoforo*,

[3] An exception to this rule would be an instruction calling for the jury to presume a fact which is an essential element of the offense, in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979). The harmless error doctrine of *Chapman* applies to violations of *Sandstrom*. *Rose v. Clark*, 106 S.Ct. 3101 (1986). However, *Sandstrom* has its roots not only in the due process requirement that the prosecution prove every element of the offense beyond a reasonable doubt, but also in the Sixth Amendment right to trial by jury. *Clark*, 106 S.Ct. at 3113 (BLACKMUN, J., dissenting).

416 U.S. 637, 642-643 (1974). Recently, in *Holbrook v. Flynn*, 106 S.Ct. 1340 (1986), a case in which armed, uniformed security guards were stationed behind the defendant during his jury trial, this Court said that

> While, in our supervisory capacity, we might express a preference that officers providing courtroom security not be easily identifiable by jurors as guards, we are much more constrained when reviewing a constitutional challenge to a state court proceeding. All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over. Respondent has failed to carry his burden here.

Id. at 1348 (footnote omitted).

Thus, in the due process cases, the harmless error doctrine of *Chapman* simply does not apply: the circumstances either give rise to an error of such fundamental importance that it cannot be harmless, or the definition of the error, for constitutional purposes, incorporates a requirement that the defendant show actual prejudice. This sort of analysis is not harmless error review, *Darden*, 106 S.Ct. at 2473, n. 15, and this Court has never squarely held that *Chapman* applies to errors implicating only the Due Process Clause.[4]

[4] The Court did invoke *Chapman* in *Rushen v. Spain*, 464 U.S. at 120, a case involving *ex parte* communication between the trial judge and a juror, but it did so without deciding "[w]hether the error was of constitutional dimension . . ." because the petitioner conceded that it was. *Id.* at 117, n. 2. As Justice Stevens pointed out, however, the error clearly was not of constitutional dimension and should have been analyzed as an alleged violation of due process. *Id.* at 123-127 (STEVENS, J., concurring in the judgment). The knowing use of perjured testimony by the prosecution is another

(Footnote continued on following page)

Another type of constitutional claim, which does not fit into any of the previously discussed categories, is a claim of ineffective assistance of counsel. Although such a claim clearly implicates the Sixth Amendment, *Strickland v. Washington*, 466 U.S. 668 (1984) holds that a defendant raising it must first overcome a "strong presumption" that counsel's performance was professionally competent, *id.* at 689, and then show "a reasonable probability . . . sufficient to undermine confidence in the outcome" that absent the errors the result of the proceeding would have been different. *Id.* at 694. This formulation of the test for prejudice was drawn from the due process context: the Court cited *United States v. Agurs*, *supra*, and *United States v. Valenzuela-Bernal*, *supra*. *Id.* It was found to be the appropriate test in ineffective assistance cases because the purpose of the Sixth Amendment guarantee of effective assistance of counsel, like the purpose of the Due Process Clause, is to ensure a fair trial resulting in a reliable, accurate adjudication of guilt or innocence. After noting that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment", the court went on to say that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." 466 U.S. at 685. The appropriate test for actual prejudice in due process

[4] *continued*
example of conduct implicating only the Due Process Clause, *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959), but the standard of review is unclear. In *Bagley*, *supra*, Justice Blackmun speaking for himself and Justice O'Connor, indicated that the language of *Giglio* and *Napue* parallels that of *Chapman*. 105 S.Ct. at 3382, n. 9. However, in *Smith v. Phillips*, 455 U.S. 209 (1982), a majority of the Court placed perjury claims in the category of due process cases requiring the defendant to show actual prejudice. *Id.* at 220, n. 10.

cases, then, is the one articulated in *Strickland* and taken from the due process context. It is whether the defendant can show "that there is a reasonable probability that, but for [the errors complained of], the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In analyzing claims of constitutional error, this Court uses a graduated standard of review, and the selection of a standard depends on the nature of the right involved. The remedy must be tailored to the injury suffered. Thus, it becomes important to identify the nature of the right protected by the rule of *Doyle*.

B. Since *Doyle* Does Not Involve Fifth Amendment Concerns, It Should Be Treated As A Due Process Case.

The decision in *Doyle* rests on two premises. The first is that silence at the time of arrest is not necessarily inconsistent with exculpatory testimony at trial, so the use of silence for impeachment purposes has dubious probative value. Silence is "insolubly ambiguous." 426 U.S. at 617. This reasoning comes from *United States v. Hale*, 422 U.S. 171 (1975), decided the year before *Doyle*, which holds that post-arrest silence may not be used for impeachment purposes. However, *Hale* was decided in the exercise of this Court's supervisory powers over the lower federal courts, not on constitutional grounds, and the fact that *Miranda* warnings were given at the time of arrest was cited as only one of the factors contributing to the conclusion that silence is too ambiguous to be probative. 422 U.S. at 177, 181. Moreover, subsequent cases abandon this strand of *Doyle*'s rationale. In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Court held that the use of pre-arrest silence for impeachment purposes was permissible because it was probative of the veracity of the defendant's trial testimony, and it did not violate *Doyle* because there

had been no *Miranda* warnings. 447 U.S. at 238-240. The holding in *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam), that use of post-arrest silence is permissible when there have been no *Miranda* warnings, follows from *Jenkins* and similarly abandons the first premise of *Doyle*.

The second premise underlying *Doyle* is that by informing the arrestee that anything he says can be used against him, the *Miranda* warnings implicitly assure him that "silence will carry no penalty", and thus it would be unfair to so induce silence at the time of arrest and then use it to impeach the testimony given at trial. 426 U.S. at 618. In the first place, as the post-*Doyle* cases make clear, this rationale is not rooted in the Fifth Amendment. *Jenkins* reaffirms the principle of *Raffel v. United States*, 271 U.S. 494 (1926) that "the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence" 447 U.S. at 235, even if the prior silence was explicitly based on invocation of the privilege. *Id.* at 236, n. 2. *Fletcher* extends that principle to the use of post-arrest silence. *Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam) holds that voluntary inconsistent post-arrest statements made after receipt of *Miranda* warnings may be used because the defendant had not been induced to remain silent. *South Dakota v. Neville*, 459 U.S. 553 (1983) holds that post-arrest refusal to submit to a blood-alcohol test, after receipt of *Miranda* warnings, may be used against the defendant because the implicit assurance that silence (or, in this case, inaction) will carry no penalty was explicitly retracted, suggesting that the rule of *Doyle* would cease to operate if the *Miranda* warnings were changed. Finally, in *Wainwright v. Greenfield*, 106 S.Ct. 634 (1986), while holding that post-*Miranda* warning silence may not be used as substantive evidence on the issue of sanity, the Court nevertheless emphasized that *Doyle* is a due process case with no Fifth Amendment lineage. *Id.* at 638-639 and n. 7, 640 and n. 10.

Further, the unfairness condemned in *Doyle* has less to do with misleading the jury to the prejudice of the defendant than it does with misconduct by State officials. While this Court has expressed the belief, in *Hale* and *Doyle*, that prior silence is not necessarily inconsistent with exculpatory testimony, and hence not probative of veracity, it has recognized that the states are free to reach a different conclusion. *Fletcher*, 455 U.S. at 605-607; *Jenkins*, 447 U.S. at 239, n. 5. Thus, *Doyle* bars the use of what may well be probative evidence concerning the veracity of a defendant's testimony, and it does so only because the sense of fair play is offended when the prosecutor reneges in the courtroom on a promise implicitly made at the station house. However, prosecutorial misconduct which does not implicate specific provisions of the Bill of Rights is generally regarded as a violation of due process only when the defendant demonstrates actual prejudice. "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Thus, in *Donnelly v. DeChristoforo, supra*, this Court said that

> [w]hen specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial misconduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention.

416 U.S. at 643. Even in cases where the misconduct was egregious in the extreme, the same analysis applies. *Darden v. Wainwright*, 106 S.Ct. at 2471-2473.

The failure to abide by a sense of fair play does not violate the Due Process Clause unless the conduct results

in actual prejudice, *Donnelly v. DeChristoforo*; or is inherently prejudicial, *Estelle v. Williams*; or is so outrageous that it "shocks the sensibilities of civilized society." *Moran v. Burbine*, 106 S.Ct. 1135, 1148 (1986). The question thus becomes, into which of these categories does *Doyle* fit.

C. Since Violations Of *Doyle* Do Not Render The Factfinding Process Inherently Unreliable, Respondent Should Be Required To Show Actual Prejudice.

Under the rubric of the Due Process Clause, this Court has declared that certain practices are so inherently prejudicial to the fairness of a trial that a search for identifiable prejudice on a case-by-case basis is not required in order to justify reversal. It has done so because those practices disable the adversarial system from performing its function of achieving reliable adjudications of guilt or innocence to such a degree that the record produced cannot be trusted as presenting an accurate reflection of the true facts. Thus, actual prejudice need not be shown where the jury convicts a defendant who has been stripped of the presumption of innocence, because the verdict cannot be counted on as resulting from consideration of the evidence adduced at trial, as opposed to official suspicion or other irrelevant matter. In such cases, appellate review is not an adequate remedy. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *Estelle v. Williams*, 425 U.S. at 504-505. The same is true of a verdict following a trial dominated by a mob. *Sheppard v. Maxwell, supra*. Similarly, no reliance can be placed on a verdict following a trial at which the defendant was mentally incompetent because under such circumstances he is unable to participate in the process, depriving it of its adversarial character. *Drope v. Missouri*, 420 U.S. at 171-172. In the sense that these cases speak of due process, it is an innocence-protecting rule of procedure. The breakdown in the system gives rise to an unacceptable risk that the adjudication

of guilt or innocence is not accurate. *Doyle* clearly does not belong in this class because it has nothing to do with the process of adjudicating guilt or innocence and operates, as *Fletcher* and *Jenkins* establish, to exclude what the states would be free to say, had there been no *Miranda* warnings, is probative evidence of guilt.

This Court has also invoked the Due Process Clause substantively, to prohibit practices which, although not undermining the process of adjudication, are inimical to the most basic concepts of fairness. *Rochin v. California, supra.* In this regard, the Court has condemned vindictive prosecution and sentencing in retaliation for the exercise of statutory or constitutional rights. *United States v. Goodwin*, 457 U.S. 368, 372-374 (1982). The unfairness condemned in *Doyle*, however, does not concern punishing a defendant for exercising his right to remain silent. *Jenkins*, 447 U.S. at 236-238. Moreover, the substantive use of the Due Process Clause has its limits, as the Court recognized in *Rochin*. 342 U.S. at 170-172. For example, Justice Powell, concurring in the result in *Parratt v. Taylor*, 451 U.S. 527 (1981), criticized the majority's ruling that negligent conduct by state officials was actionable under 28 U.S.C. §1983 as a violation of due process, stating his view that the substantive reach of the Due Process Clause does not go beyond "intentional and malicious" behavior. *Id.* at 552-553. This became the view of the majority in *Daniels v. Williams*, 106 S.Ct. 662, 664-665 (1986), which partially overruled *Parratt.*

In no sense can a violation of *Doyle* be considered the sort of malicious conduct which is so reprehensible that no civilized society can tolerate it. Indeed, every circuit, by applying a harmless error standard of review to *Doyle* violations, has said as much. While a broken promise may be cause for concern, it does not necessarily follow that fundamental fairness has been denied. *Moran v. Burbine*, 106 S.Ct. at 1147-1148 (holding that deliberate police de-

ception of a suspect's lawyer as to whether they would interrogate her client in her absence did not violate due process).

Accordingly, the appropriate standard of review for violations of the rule of *Doyle* is that used by this Court in the majority of cases arising under the Due Process Clause. Since the rule of *Doyle* is not aimed at unacceptably reprehensible behavior and does not protect the innocent, respondent should be required to show actual prejudice.

II.

THE HARMLESS ERROR RULE OF *CHAPMAN v. CALIFORNIA* SHOULD NOT BE APPLIED IN FEDERAL HABEAS CORPUS PROCEEDINGS, BECAUSE THE INTERESTS WHICH COMPETE WITH THE POLICY OF STRICT ENFORCEMENT OF CONSTITUTIONAL RIGHTS ON COLLATERAL REVIEW OUTWEIGH THE NEED FOR STRICT ENFORCEMENT.

By its holding in *Chapman v. California*, 386 U.S. 18 (1967) that even some constitutional errors may be harmless, this Court acknowledged that constitutional rights must sometimes give way to competing interests. The strict standard of review established in *Chapman* serves the dual purpose of accommodating those interests without diluting the importance to society of constitutional protections. However, since *Chapman* was decided on direct review, it does not take into account the unique problems associated with collateral attacks in federal court on state court convictions. When those problems are added to the balance, a recalibration of the competing interests is required.

The central concern of the writ of habeas corpus is the fundamental fairness of an individual judgment by which the State seeks to maintain an individual prisoner in custody, and not the full spectrum of societal values embodied in the Constitution and served by the *Chapman* standard.

See Strickland v. Washington, 466 U.S. 668, 697 (1984). The appropriate standard for collateral review of any constitutional claim which might be found harmless on direct review, then, is whether the habeas applicant can show a reasonable likelihood that, had the error not occurred, the jury would have entertained a reasonable doubt as to his guilt. *Strickland*, 466 U.S. at 689. This standard properly balances the governmental interests in finality of judgments and harmonious federal-state relations with the applicant's interest in release from a fundamentally unjust incarceration. Thus, even assuming that a violation of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976) is a constitutional error which would be subject to harmless error review under *Chapman* on direct appeal, respondent should be required in this habeas corpus proceeding to show actual prejudice sufficient to undermine confidence in the outcome.

A. The *Chapman* Standard Reflects A Concern Not Just For The Fairness And Accuracy Of The Adjudication Of Guilt Or Innocence, But For The Broader Values Embodied In The Constitution As Well.

The rights afforded by the Constitution to those accused of crimes serve values that go beyond protecting the innocent against a miscarriage of justice. They also serve the broader societal interests in a humane system of criminal justice, and in individual autonomy and personal privacy. *Vasquez v. Hillery*, 106 S.Ct. 617, 622 (1986); *Stanford v. Texas*, 379 U.S. 476, 481-485 (1965). Vindication of those values, however, does not come without a price. The guilty may escape punishment, probative evidence may be kept from the trier of fact, and the reversal of convictions requires expenditure of the limited resources of the criminal justice system on affording retrials when they might be better spent on affording first trials to others. *United States v. Mechanik*, 106 S.Ct. 938, 942 (1986); *United States v. Leon*, 468 U.S. 897, 907-908 (1984);

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-424 (1971) (BURGER, C.J., dissenting). The remedy for a constitutional violation is frequently a windfall for the defendant which is disproportionate to the harm done to him, but because of the surpassing importance of the values reflected by certain rights, they are strictly enforced. This policy finds its expression in *Chapman*, which requires the prosecution, as the beneficiary of a constitutional error, to prove it harmless beyond a reasonable doubt in order to preserve the conviction on direct review.

That this standard was fashioned to serve the full spectrum of constitutional values, and not just the accuracy of the determination of guilt, can be seen in the difference between harmless error review for constitutional errors on the one hand and nonconstitutional errors on the other. Errors of constitutional dimension are harmless only if the prosecution can prove them harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. The burden of persuasion is on the beneficiary of the error, and the proper focus of the inquiry is on whether there is any possibility that the error contributed to the verdict. *Id.*; *Schneble v. Florida*, 405 U.S. 427, 432 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969). Overwhelming evidence of guilt, untainted by the error, is the minimum requirement to prove harmlessness. *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1438 (1986); *United States v. Hastings*, 461 U.S. 499, 510-511 (1983). This burden is "considerably more onerous than the standard for nonconstitutional errors adopted in *Kotteakos v. United States*, 328 U.S. 750 (1946)." *United States v. Lane*, 106 S.Ct. 725, 730, n. 9 (1986). The rule of *Kotteakos*, codified in 28 U.S.C. §2111, is that judgments may not be reversed based on errors which do not affect the substantial rights of the parties. 328 U.S. at 765. Reversal is not warranted unless "actual prejudice" is shown. *Lane*, 106 S.Ct. at 732.

The difference between these two standards cannot be explained in terms of the prejudicial effect on the determination of guilt caused by constitutional errors as opposed to nonconstitutional errors. Indeed, almost 20 years after *Chapman* was decided, six circuits were applying a *per se* rule of reversal for the nonconstitutional error of misjoinder because misjoinder was deemed inherently prejudicial. *Lane*, 106 S.Ct. at 727, n. 1. Thus, the only consideration which distinguishes *Chapman* from *Kotteakos* is heightened sensitivity where the broader societal values embodied in the Constitution are concerned.

B. Since The Central Concern Of The Writ Of Habeas Corpus Is The Fundamental Fairness Of The Trial, And Because Collateral Review Entails Significant Costs Not Associated With Direct Review, *Chapman* Is Not An Appropriate Standard To Apply In Habeas Corpus Proceedings.

The balance struck by the Court in *Chapman* in formulating the standard for harmless error review of constitutional claims takes account of the competing interests present on direct review. *Delaware v. Van Arsdall*, 106 S.Ct. at 1436-1437; *United States v. Hastings*, 461 U.S. at 508-509. Collateral review, however, is another matter. Once the process of trial and direct appeal has run its course, the interests which compete with constitutional values take on greater importance. For example, the Fourth Amendment is enforced at trial by application of the exclusionary rule, *Mapp v. Ohio*, 367 U.S. 643 (1961), and on direct appeal by application of *Chapman*. *Franks v. Delaware*, 437 U.S. 154, 162 (1978). It is not enforced on collateral review because the beneficial effects of enforcement at that stage are marginal, and the costs too high. *Stone v. Powell*, 428 U.S. 465, 489-496 (1976). On collateral review, the only concern sufficient to outweigh the costs of enforcing the Fourth Amendment is the concern for an adequate corrective process in the state courts for the litigation of Fourth Amendment claims. *Id.* at 494.

In addition, significant interests come into play on collateral review which are not present on direct review. At least since *Brown v. Allen*, 344 U.S. 443 (1953), the Habeas Corpus Act has been construed as conferring federal jurisdiction to review the final judgment of a state court of competent jurisdiction which has determined the merits of a constitutional claim after a full and fair hearing. This power exists even with respect to claims that were procedurally defaulted in state court, or for which state court remedies are still available. *Fay v. Noia*, 372 U.S. 391, 417-420, 424-427 (1963). However, the power of a single federal judge to void a conviction entered in state court, after rigorous scrutiny at every level of the state judiciary, raises important questions concerning federalism, comity, and finality. *Rose v. Lundy*, 455 U.S. 509, 518-520 (1982); *Sumner v. Mata*, 449 U.S. 539, 543-546, 550 (1981); *Wainwright v. Sykes*, 433 U.S. 72 (1977). *See also* Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U.Chi.L.Rev. 142, 146-151 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 444-462 (1963).

Addressing these concerns has been a process of balancing competing interests. For instance, while this Court has never retreated from the pronouncement in *Fay* that habeas jurisdiction extends to all constitutional claims regardless of exhaustion or procedural default problems, *Francis v. Henderson*, 425 U.S. 536, 538-539 (1976), it has reassessed the considerations which restrain the exercise of that jurisdiction. Thus, in *Rose v. Lundy, supra*, the Court held that even claims for which state remedies have been exhausted could not be considered if presented in a petition that also contained unexhausted claims, and in *Francis v. Henderson* and *Wainwright v. Sykes* it replaced the deliberate bypass test of *Fay* for procedurally defaulted claims with the cause and prejudice test. It has done so in the interest of comity and finality. *Smith v.*

Murray, 106 S.Ct. 2661, 2665-2666 (1986); *Murray v. Carrier*, 106 S.Ct. 2639, 2645 (1986); *Engle v. Isaac*, 456 U.S. 107, 126-128 (1982); *Rose v. Lundy*, 455 U.S. at 518.

It must be remembered, though, that the costs in terms of comity and finality inhere in any habeas case, whether or not it involves questions of exhaustion or procedural default. Those problems serve only to elevate the costs. *Engle*, 456 U.S. at 128. Intrusive collateral review of state court convictions frustrates deterrence and rehabilitation because it detracts from finality; it diminishes the significance of the trial as the focal point of the criminal process; and it undermines the morale of state court judges, who are sworn to uphold the Constitution just as federal judges are. *Id.* at 127-128; *Wainwright v. Sykes*, 433 U.S. at 90; *Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (POWELL, J., concurring). *See also* Friendly, at 145-146; Bator, at 451-452. Liberal allowance of the writ results in costly retrials, and often allows the guilty to escape just punishment because the evidence has grown stale over the lapse of time. *Engle*, 456 U.S. at 127-128. All of these considerations suggest that *Chapman*, which did not take them into account, is not the appropriate standard of review on collateral attack. Unlike direct review, where the full spectrum of constitutional values must be considered if they are ever to be considered, "fundamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. at 697. A trial, though not perfect, is fundamentally fair if "evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding"; if the accused has competent counsel to assist him; and if the verdict results from consideration of properly admitted evidence and not improper influences. *Id.* at 685, 689. Moreover, in habeas corpus proceedings, "the burden of showing essential unfairness [must] be sustained by him who claims such injustice and

seeks to have the result set aside, and . . . it [must] be sustained not as a matter of speculation but as a demonstrable reality." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942). *Cf. Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution"); *Brown v. Allen*, 344 U.S. at 458, n. 6 ("the burden of overturning the conviction rests on the applicant . . .").[5]

That *Strickland v. Washington, supra*, supplies the approprate standard of review follows from the near-identity of interests protected by the Habeas Corpus Act and the Sixth Amendment guarantee of effective assistance of counsel.

> In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . .

Strickland, 466 U.S. at 684-685 (citations omitted).

> The principles governing ineffective assistance claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As

[5] This Court's decisions make clear that *Chapman* has never been considered sacrosanct on collateral review. Regardless of the nature of a constitutional claim that has been procedurally defaulted in state court, a habeas applicant, even if he can show cause for the default, must also show "actual prejudice." *Engle*, 456 U.S. at 129; *United States v. Frady*, 456 U.S. 152, 170 (1982). If he cannot show cause, or if he presents his claim in a successive petition, he must show more than actual prejudice. He must show a colorable claim of factual innocence. *Smith v. Murray*, 106 S.Ct. at 2668; *Murray v. Carrier*, 106 S.Ct. at 2650; *Kuhlmann v. Wilson*, 106 S.Ct. 2616, 2627 (1986) (plurality opinion).

> indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. . . . An ineffective assistance claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus . . . no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Id. at 697-698 (citations omitted). Where the "overriding concern [is] with the justice of the finding of guilt", *United States v. Agurs*, 427 U.S. 97, 112 (1976), the *Strickland* standard is "sufficiently flexible", *United States v. Bagley*, 105 S.Ct. 3375, 3384 (1985) to provide the proper balance between the governmental interests in comity and finality and the habeas applicant's interest in release from an unjust incarceration. Accordingly, respondent should be required to show a reasonable likelihood, sufficient to undermine confidence in the result, that the prosecutor's violation of the rule of *Doyle* affected the outcome of the trial.

III.

THE VIOLATION OF THE RULE OF *DOYLE v. OHIO* IN THIS CASE DOES NOT GIVE RISE TO A REASONABLE PROBABILITY THAT, BUT FOR THE ERROR, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

While this Court does not ordinarily undertake its own review of the record to determine the presence or absence of prejudice, *see Rose v. Clark*, 106 S.Ct. 3101, 3109 (1986); *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1438 (1986), the task is facilitated in this case by the analyses contained in five prior opinions, setting forth the essentially undisputed facts relevant to the inquiry. *Cf. United*

States v. Hastings, 461 U.S. 499, 510 (1983). The majority of the Court of Appeals found that "[t]he crux of this trial was whether the jury believed the Williamses or believed Miller" on the one critical point of departure in their testimony—did Randy Williams and Butch Armstrong pick respondent up at the trailer court before or after Neil Gorsuch was murdered. (App. to Pet. for Cert. at A-14) This was also the view of the case expressed by the prosecutor and the trial judge. (J.A. 46, 49) Since there was little in the way of corroboration for Randy Williams' testimony on this point, and none for respondent's,[6] the Court of Appeals, applying *Chapman v. California*, 386 U.S. 18 (1967), saw the question before it as whether it could find "beyond a reasonable doubt that the prosecutor's comment had no effect on the jury's assessment of Miller's credibility, and hence on the jury's verdict." (App. to Pet. for Cert. at A-14) However, when the appropriate standard of review is applied, the question becomes not only whether respondent's credibility was damaged, but also whether he can show that the jury probably would have believed him instead of Williams had he not incurred that damage. Unless the record reveals some compelling reason for the jury to disbelieve Randy Williams, it cannot be said that, to a reasonable probability, the prosecutor's attempted violation of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976) accounts for their choice.

The Court of Appeals viewed Williams' testimony as "inherently unreliable" because he was an accomplice, and

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[6] Rick Williams did corroborate his brother's testimony when he testified that respondent admitted participating in the murder. (Vol. VI, 173-174) The Court of Appeals characterized this as "indirect evidence" of respondent's involvement. (App. to Pet. for Cert. at A-13, n. 6) Regardless of the characterization, however, it is at least noteworthy that there was some corroboration for Williams' testimony concerning who participated in the murder while there was none for respondent's denial of involvement.

accomplice testimony is "often motivated by factors such as malice toward the accused and a promise of leniency or immunity." (App. to Pet. for Cert. at A-14) However, juries can only judge the credibility of witnesses based on the information they are provided. If Williams' testimony was vulnerable to attack on grounds of malice or self-interest, it was still necessary to bring those grounds out on cross-examination in order for the jury to give them any weight. In the entire day-long cross-examination of Williams, no testimony was elicited to establish that he harbored any kind of grudge against respondent. He was cross-examined concerning his plea agreement with the prosecutor (J.A. 6-7), but it would require a considerable stretch of the imagination to conclude that the agreement provided a motive for him to falsely accuse respondent, because he accused respondent more than three months before the agreement was reached. Williams and respondent were arrested at 5:00 a.m. on Sunday, February 10, 1980, and Williams made a statement implicating himself, respondent, and Butch Armstrong shortly after noon the same day. (Vol. VI, 44, 60-61) He was charged with murder, aggravated kidnapping, kidnapping, and armed robbery. (J.A. 6) He did not plead guilty to the kidnapping charge until May 24, 1980 (C. 276), and he was still listed as a defendant in this case along with respondent and Armstrong on the caption of pleadings filed a few days earlier. (C. 195) From this, it is evident that no agreement was discussed at the time of the February 10 statement. Thus, to believe that the agreement which was eventually reached provided a motive to falsely accuse respondent attributes to Williams the extraordinary prescience to foresee, seven hours after his arrest, that a statement implicating himself as well as respondent in a murder would ultimately work to his advantage. This is, to say the least, an unreasonable belief. Moreover, if respondent was telling the truth—if the murder was committed by Williams and Armstrong—Williams could have

negotiated an agreement based on his testimony against Armstrong alone. He could not possibly have believed that there was anything to be gained by introducing into his account a totally extraneous third culprit whom he knew to be innocent. In short, Williams had no reason at the time of his arrest to lie about respondent's involvement in the murder.

Furthermore, under the appropriate standard of review, the other matters considered by the Court of Appeals are cast in a different light. While it is true that the balance of the State's case provided no direct corroboration for Williams' testimony that respondent participated in the murder, it is also true, as the Illinois Supreme Court found (App. to Pet. for Cert. at D-5-6), that the evidence corroborated Williams in virtually every other respect. There was nothing about Williams' testimony which was at odds with the verifiable facts, and thus no reason for the jury to disbelieve him based on the evidence presented. The trial court's curative instruction—that the jurors were to "ignore that last question, for the time being" (J.A. 32)—although ambiguous, was clarified at the end of the case by the general instruction that the jury "should disregard questions . . . to which objections were sustained." (J.A. 47)[7] Finally, the Court of Appeals expressed concern for the damaging effects of the error resulting not only from its occurrence but from its timing. (App. to Pet. for Cert. at A-12-13) However, the jury

[7] That the initial instruction was conditional was due to the fact that neither the attorneys nor the trial judge appeared to be aware of *Doyle*. The judge stated that he would sustain the objection, but check for authority during the cross-examination and allow the question to be asked if he could determine that it was proper. (J.A. 32) He later determined that it was not, and so informed counsel at a sidebar conference. (J.A. 43) Defense counsel did not ask for a more definite instruction at that time. Respondent testified on the morning of June 9, 1980, the general instructions were given that afternoon, and the verdicts returned that evening.

might not have necessarily viewed respondent's post-arrest silence as impeaching, because respondent testified on direct examination that although he knew about the murder from Williams and Armstrong, he had agreed not to tell anyone about it:

> I asked 'em if Rick knew about it, and Randy said no, and "Butch", then, he said he thought they oughtta' tell Rick about it, 'cause "Butch" said if the police came, he was gonna deny ever bein' with the dude and he said Randy should do the same thing and they oughtta' tell Rick so he would say the guy wasn't with 'em.
>
> * * *
>
> "Butch" just told me to make sure I don't say nothin' to nobody about and I told him I wouldn't.

(J.A. 14-15)

Randy Williams' testimony was plausible and consistent with the other evidence. He had no reason to lie about respondent's involvement, especially since he could just as easily have negotiated a plea agreement based on his testimony against Armstrong alone if respondent was not actually involved. Under these circumstances, the jury had no compelling reason to disbelieve Williams. Therefore, it cannot be said that the *Doyle* violation was their only reason not to believe respondent. Accordingly, the judgment of the Court of Appeals awarding respondent a writ of habeas corpus should be reversed.

CONCLUSION

Doyle v. Ohio, 426 U.S. 610 (1976) is based solely on the Due Process Clause, and attaches a constitutional label to a set of facts that does not otherwise implicate constitutional rights. In such cases, the harmless error doc-

trine of *Chapman v. California*, 386 U.S. 18 (1967) does not apply, because the defendant must show that the error resulted in actual prejudice in order to support a claim that it violated due process. Alternatively, even if the stringent *Chapman* standard is the appropriate one to apply on direct appeal for violations of *Doyle*, the cost of such strict enforcement on collateral review outweighs the benefits. The principle concern of the writ of habeas corpus is the fundamental fairness of the judgment by which the State seeks to maintain an individual in custody. Regardless of the nature of the claim, the habeas applicant must demonstrate actual prejudice in order to show that his incarceration is fundamentally unfair. For these reasons, the Court of Appeals erred in applying *Chapman* in this case.

Finally, because the record does not support the assertion that, absent the *Doyle* violation, the jury would have entertained a reasonable doubt as to respondent's guilt, he is not entitled to habeas corpus relief. The judgment of the Court of Appeals should therefore be reversed.

Respectfully submitted,

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January 30, 1987

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No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES GREER,
Warden, Menard Correctional Center,
Petitioner,

v.

CHARLES "CHUCK" MILLER,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether it is necessary for this Court to reach the merits of the State's claims relating to the proper standard of review, where respondent would be entitled to relief regardless of the standard of review applied.

II.

Whether the harmless error standard of *Chapman* v. *California* applies to violations of *Doyle* v. *Ohio*, where the *Chapman* standard applies to all federal constitutional errors which are not subject to automatic reversal, including violations of the Due Process Clause of the Fourteenth Amendment.

III.

Whether the harmless error standard of *Chapman* v. *California* should be abandoned on federal habeas corpus review, where the *Chapman* standard and the writ of habeas corpus share a central concern for fundamental fairness.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution
Amendment XIV

All persons born or naturalized in the United States, and subject to the jursidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code
Title 28 § 2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The Court of Appeals held that the prosecutor violated respondent Miller's constitutional right to a fair trial by commenting upon Miller's silence at the time of his arrest in violation of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). (A. 7) After further finding that "the [S]tate has not met its burden of proving that the prosecutor's clear violation of *Doyle* was harmless beyond a reasonable doubt" (A 15), the Court of Appeals granted a writ of habeas corpus and ordered that the State retry respondent Miller. (A 16) On appeal to this Court, the State acknowledges that *Doyle* was violated, but contends that a less stringent standard of harmless error review should be applied to the constitutional violation.

The State's statement of the case is generally acceptable, insofar as it goes. However, since the ultimate resolution of the appeal depends on whether the State's acknowledged constitutional violation constituted harmless error, the additional facts relevant to this issue are set forth below.

A. Pretrial

On February 11, 1980, an Information was filed in Illinois Circuit Court alleging that Charles Miller, "acting in conjunction with Clarence 'Butch' Armstrong and Randy Williams," committed the offenses of kidnapping, aggravated kidnapping, armed robbery, and murder. (C. 2-5) The charges arose from the shooting death of Neil Gorsuch which had occurred during the early morning hours of February 9, 1980.

Prior to respondent Miller's trial, the State agreed to dismiss the charges of murder, aggravated kidnapping, and armed robbery against Williams, in return for his testimony. (JA 6-7) After Miller's conviction, Williams

was sentenced on the kidnapping charge to two years probation, while Miller was sentenced to eighty years in prison. (A 14)

B. Trial

The evidence established that at 1:30 a.m. on the morning of February 9, 1980, Randy Williams, Rick Williams, and Butch Armstrong were observed leaving the Regulator, a Jacksonville, Illinois tavern, in the company of Neil Gorsuch. (Vol. VIII, R. 55-57, 70-71, 75, 80; Vol. VI, R. 321-323) Later the same day at approximately 2:00 p.m., the body of Neil Gorsuch was discovered partially submerged in the Mauvaisterre creek under a bridge in rural Morgan County, Illinois. (Vol. V, R. 46-47, 53-54) A twelve gauge shotgun shell was recovered under the bridge in close proximity to the body. (Vol. V, R. 105)

Randy Williams was arrested the following day. (Vol. IV, R. 28-29) Williams subsequently admitted his participation in a series of event culminatng in the murder of Neil Gorsuch. (Vol. R. 523) Williams also implicated Armstrong and respondent Miller in the murder, but exculpated his brother Rick Williams. (C. 557-558; Vol. III, R. 18-23)

The police searched Randy Williams's residence and seized a twelve gauge shotgun from under Williams's bed. (Vol. VIII, R. 6) Acting on information provided by Williams, the police recovered three shotgun shells near the side of the road approximately two miles from the Mauvaisterre bridge. (Vol. VII, R. 11-12, 52) The police subsequently established that the four shotgun shells recovered at or near the Mauvaisterre bridge had been fired from Williams's shotgun. (Vol. VI, R. 59)

The ensuing autopsy established that Gorsuch had suffered numerous contusions and lacerations about his head

and body prior to death. (Vol. V, R. 161-162) "A gaping laceration" on the forehad of the deceased appeared to have resulted from something "not very sharp, as a knife, but sharp as the corner of an object." (Vol. V, R. 164) It also appeared that two shotgun wounds to the back of the head were present, although it was impossible to determine the exact number of shotgun wounds because of the destruction of the skull. (Vol. V, R. 153-156) Dr. John Dietrich, who conducted the autopsy, described the wounds as "contact" or "near contact" wounds, explaining:

> A contact wound is one in which the weapon is held on the surface of the subject and discharged. A near contact is within a centimeter or so from it — very close, but no[t] quite in contact.
>
> (Vol. V, R. 150, 157)

Dr. Dietrich opined that the cause of death was a gunshot wound to the head, but acknowledged that the death could have occurred from a sharp blow to the head with a hard object. (Vol. V, R. 165-166) Because the county coroner had ignored repeated requests to determine the core temperature of the body immediately after the body was recovered, Dr. Dietrich was unable to estimate the time of death. (Vol. V, R. 83, 98, 120-121, 139-140, 152-153)

Dr. James Hicks, a forensic scientist who had performed approximately 2000 autopsies, examined the autopsy protocol and observed photographs of the deceased. (Vol. VII, R. 137-139) Dr. Hicks concluded that the gaping laceration on the forehead of the deceased was inflicted prior to death, and could have been caused by a martial arts device known as "numchucks." (Vol. VII, R. 139-140) Dr. Hicks opined that Gorsuch could have died prior to receiving shotgun wounds. (Vol. VII, R. 143) Because only a minute amount of blood was found on the

Mauvaisterre bridge, Dr. Hicks concluded that Neil Gorsuch was not shot at the bridge. (Vol. VII, R. 141-142)

1. The Accomplice Testimony of Randy Williams

Randy Williams testified that he owned a twelve gauge shotgun, a .32 caliber pistol, and three pairs of numchucks. (Vol. VI, R. 228, 400) Williams acknowledged that he was proficient with the numchucks, and that they could be used as weapons. (Vol. VI, R. 401, 403)

On Friday, February 9, 1980, Williams began consuming beer at approximately 1:30 p.m. and continued the entire day. (Vol. VI, R. 287, 293-294) That evening, Williams, accompanied by his brother Rick and Butch Armstrong, went to the Regulator tavern. (Vol. VI, R. 287, 293) At approximately midnight, they each consumed "M.D.A.", which Williams described as an "animal tranquilizer." (Vol. VI, R. 290-291) At approximately 1:30 a.m. the trio left the tavern accompanied by Neil Gorsuch, whom they had met for the first time that evening. (Vol. VI, R. 220-223)

Williams further testified that after leaving the tavern, they got into an automobile owned by Rick's girlfriend. (Vol. VI, R. 223-224, 350) According to Williams, they dropped his brother Rick off at the girlfriend's residence, and then rode around. (Vol. VI, R. 224-225) Williams drove while Armstrong and Gorsuch remained in the back seat. (Vol. VI, R. 224)

Williams stated that Armstrong suddenly began hitting Gorsuch and that the beating continued for "quite a while." (Vol. VI, R. 225) Following the beating, a stocking hat belonging to Williams was pulled over the victim's head and eyes. (Vol. VI, R. 227, 346, 350) They subsequently proceeded to Williams's residence. (Vol. VI, R. 226) Williams could not recall how long they had driven

around prior to arriving at his residence. (Vol. VI, R. 340-341)

After arriving at Williams's residence, Gorsuch was ordered into the bathroom. (Vol. VI, R. 227) Williams acknowledged that his .32 caliber revolver was lying on the kitchen table and that his twelve gauge shotgun was located in a closet with three pairs of numchucks. (Vol. VI, R. 228-229) According to Williams, Armstrong placed the revolver in his pocket and then obtained the shotgun from the closet, as well as shotgun shells from a bedroom dresser. (Vol. VI, R. 229-230) Armstrong then struck Gorsuch over the back of the head with the shotgun. (Vol. VI, R. 223) After loading the shotgun, they returned to the car. (Vol. VI, R. 237, 375) Gorsuch had to be led by the arm because his face was still covered by the stocking cap. (Vol. VI, R. 232, 237, 375) Williams estimated that they had remained at his residence for forty-five minutes. (Vol. VI, R. 341)

Williams drove around with Armstrong and Gorsuch seated in the back of the car. (Vol. VI, R. 241) Armstrong fired a shot from the .32 caliber revolver into the backseat, missing Gorsuch. (Vol. VI, R. 241) Williams further testified that they subsequently arrived at a trailer court where respondent Miller resided. (Vol. VI, R. 242-243) Williams could not recall how long it had taken to get from his house to the trailer court. (Vol. VI, R. 341) Williams acknowledged that he had given a signed statement to the police in which he indicated that Armstrong had shot the revolver into the back seat only after leaving the trailer court. (Vol. VI, R. 398)

Williams further stated that Armstrong got out of the car, entered a trailer, and returned a few minutes later with respondent Miller. (Vol. VI, R. 243-244) They subsequently proceeded to the Mauvaisterre bridge with

Williams driving. (Vol. VI, R. 246-247, 255) After arriving at the bridge, Armstrong pulled Gorsuch out of the car, pushed him against the rail of the bridge, pulled the stocking hat off his head, and stated that "we was going to shoot this man." (Vol. VI, R. 257-259) According to Williams, Armstrong handed Miller the shotgun and respondent shot Gorsuch from a distance of ten to twelve feet. (Vol. VI, R. 259-260, 441) Armstrong reloaded the gun and shot Gorsuch. (Vol. VI, R. 261) Williams further stated that Armstrong was standing "back of him a ways" when the shot was fired. (Vol. VI, R. 445)

According to Williams, Armstrong reloaded the gun and directed him to shoot at the body. (Vol. VI, R. 261, 263) Williams shot at the body twice, missing the first time. (Vol. VI, R. 261-263) Williams testified that he was standing toward the back of the car when he shot Gorsuch. The car was parked off the bridge and Gorsuch was leaning over the rail of the bridge. (Vol. VI, R. 446-449) Williams further testified that Armstrong subsequently walked to the body and pushed it over the rail of the bridge. (Vol. VI, R. 264)

They returned to town. (Vol. VI, R. 268) Williams testified that it was still dark out when they arrived in town, but he could not recall how long it took to return from the bridge. (Vol. VI, R. 341) After returning his shotgun to his residence, Williams drove Armstrong home. (Vol. VI, R. 268-269) According to Williams, he and respondent then proceeded to Dottie's Cafe, which was run by Williams's mother. (Vol. VI, R. 269) Williams could not recall how long it took to get from his residence to the restaurant. (Vol. VI, R. 341) Williams stated that it was starting to get light when they arrived at the cafe and they stayed there "a little while" and ate breakfast. (Vol. VI, R. 269-271) They subsequently returned to Miller's trailer and Miller exited the car. (Vol. VI, R. 269-271)

Williams further testified that that the next evening, he and Miller told Rick Williams that they had killed Gorsuch. (Vol. VI, R. 279-280) However, Williams acknowledged that although he had given a formal statement to the police following his arrest in which he admitted his involvement in the crime and implicated Miller, he did not tell the police about the conversation with Rick Williams and Miller that had allegedly occurred the night before. (Vol. VI, R. 467) Williams had stated to police that the only thing he had informed his brother Rick was that "I think I might be in trouble." (Vol. VI, R. 467) Williams further testified that he had lied when he had given the statement to the police. (Vol. VI, R. 468)

Randy Williams concluded his testimony by stating that he had voluntarily participated in the sequence of events which had led to the death of Neal Gorsuch, but everything that had happened was "all Butch Armstrong's idea." (Vol. VI, R. 416, 521)

2. The Testimony of Rick Williams

Rick Williams acknowledged that he left the Regulator Tavern at approximately 1:30 a.m. on the morning of February 9, 1980, in the company of his brother, Butch Armstrong, and Neal Gorsuch. (Vol. VI, R. 165-167) Rick further stated that the following evening, his brother and Miller told him that they had killed Gorsuch. (Vol. VI, R. 173) On cross-examination, Rick identified a signed statement which he had given to the police on February 10, 1980. (Vol. VI, R. 201-203) His brother Randy was present when Rick gave the statement. (Vol. VI, R. 201) The statement contained the following colloquy between the police and Rick Williams:

> POLICE: Rick, did Randy tell you anything last night about what happened after you were dropped off?
>
> ANSWER: All that he said was that he might be in big trouble. I don't really understand if he was in trouble or somebody else was in trouble—someone else was bein[g] in trouble.
>
> (Vol. VI, R. 203-205)

Rick further testified that he had lied when he had given the foregoing statement. (Vol. VI, R. 205) Rick Williams also acknowledged that he had lied when he told the police that Neil Gorsuch was not with them when he, his brother, and Butch Armstrong left the Regulator Tavern Friday night. (Vol. VI, R. 205-206)

3. The Testimony of Respondent Charles Miller

Charles Miller testified that it was approaching daybreak when Butch Armstrong entered the trailer on the morning of February 9, 1980. (Vol. VII, R. 76-77) Miller had been asleep on the living room floor prior to being awakened by Armstrong. (Vol. VII, R. 76) David and Debbie Elliott, Barb Sitton, and Theresa McDade were also present in the trailer. (Vol. VII, R. 76) Armstrong informed Miller that he could not explain what he wanted in front of the others, and asked Miller to accompany him to the car. (Vol. VII, R. 77)

Miller accompanied Armstrong to the automobile where Randy Williams was waiting. (Vol. VII, R. 78) They drove to Williams's residence. (Vol. VII, R. 79) While in route, Armstrong explained that he and Williams needed advice because they had shot someone. (Vol. VII, R. 79)

After entering Williams's house, Miller observed blood on the floor and asked where it had come from. (Vol. VII, R. 83) Williams responded by exhibiting a pair of numchucks and explained that he had hit a man in the head with them. (Vol. VII, R. 83) Armstrong told Miller

that they subsequently killed the man because they were afraid he would contact the police regarding the beating. (Vol. VII, R. 82)

Miller further stated that he and Williams took Armstrong home and then had breakfast at Dottie's Cafe. (Vol. VII, R. 86) After breakfast, Miller returned to the trailer. (Vol. VII, R. 86) He and Williams were arrested the next night at a gas station on their way home from a party. (Vol. VII, R. 105)

4. The Other Relevant Testimony

The parties stipulated that the sun rose at 6:59 a.m. on February 9, 1980. (Vol. VI, R. 491)

David Elliott was present at Miller's trailer when Armstrong arrived on the morning of February 9. (Vol. VIII, R. 179) Elliott observed through the kitchen window that it was approaching daylight at that time. (Vol. VIII, R. 179-182) Elliott further stated that Miller returned to the trailer at 8:00 a.m. (Vol. VIII, R. 175)

5. The Prosecutor's Closing Argument

During his closing argument to the jury, the prosecutor acknowledged that:

> We made a deal, if you want to call that, with a guy who is willing to tell the truth, the man who told the truth of his involvement on February 10, 1980. Sure, he was wrong in details; sure, he left some things out; sure his statement is confusing; sure, he lied at that time about not being with his brother as they left the Regulator Tavern at first, but he was in custody only a few hours. He was charged with murder. He knew they had him, cold turkey, but he told them a story, as they call it, an account, as I call it, shortly after his arrest, factually corroborated by an independent investigator.

> So, if you call that a deal, put that aside. The question is, deal or no deal, did Randy tell you the truth? It really boils down to, who told you the story here and who told you the truth? You either believe Randy Williams or you believe "Chuck" Miller. That is your choice. It's as simple as that.
>
> (JA 45-46)

C. Post-Trial

Following the trial, the court made the following comments while ruling on defense counsel's motion for fees:

> Nothing complex about the trial; the trial, actually, was a swearing match. You had two witnesses, when you get right down to it.

(Vol. XI, R. 62)

The trial judge further commented:

> In this case, without the "swearing match," there was no way the State was going to convict Mr. Armstrong or this defendant, Miller. You had to have Mr. Williams's testimony, so it boils down to a swearing match; which was the jury going to believe?
>
> Fortunately for the State, they believed their witness. Unfortunately for the defendant, they believed their witnesses. Could have gone just the opposite.
>
> (Vol. XI, R. 63)

SUMMARY OF ARGUMENT

1. The State's case against respondent Miller was entirely dependent upon the inherently suspect accomplice testimony of Randy Williams. There was no direct corroboration for Williams's allegations that respondent had been involved in the crimes, and Williams's testimony was severely discredited. Miller, testifying on his own behalf, disputed Williams's allegations and denied involve-

ment in the crimes. On cross-examination, the prosecutor immediately attacked Miller's credibility by commenting on his post-arrest silence in direct violation of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Following Miller's conviction, the trial judge noted that the trial was in essence a credibility contest and that the outcome "[c]ould have gone just the very opposite."

Chapman v. *California*, 386 U.S. 18 (1967) held that before federal constitutional errors can be held harmless, the court must be able to conclude that they were harmless beyond a reasonable doubt. The State argues that the *Chapman* standard should not be applied either to *Doyle* violations or on habeas corpus review of state convictions. Instead, the State argues that the victim of the constitutional error should be required to demonstrate that the error probably affected the outcome of the trial. However, because the prosecutor's unconstitutional attack on Miller's credibility had a direct effect on the outcome of the credibility contest between Miller and Williams, Miller would be entitled to a new trial even under the standard proposed by the State. Consequently, it is unnecessary to reach the merits of the State's claims concerning the proper standard of review.

II. In *Chapman*, the Court held that federal constitutional errors cannot be found harmless unless they are harmless beyond a reasonable doubt. This Court has repeatedly held that *Doyle* violations are errors of constitutional magnitude. Consequently, the *Chapman* harmless error standard applies to *Doyle* violations.

III. The *Chapman* harmless error doctrine focuses on the fundamental fairness of the trial rather than on the presence of immaterial error, thereby saving the time, effort and expense of unnecessary retrials where the defendant has not been prejudiced by the error. Since

fundamental fairness is also the principal concern of the writ of habeas corpus, there is no reason to abandon the *Chapman* standard on habeas review.

ARGUMENT

I. SINCE RESPONDENT IS ENTITLED TO RELIEF REGARDLESS OF THE STANDARD OF REVIEW APPLIED, IT IS UNNECESSARY FOR THIS COURT TO REACH THE STATE'S CONTENTION THAT THE HARMLESS ERROR STANDARD OF *CHAPMAN* V. *CALIFORNIA* SHOULD BE ABANDONED.

The State acknowledges that the prosecutor violated respondent Miller's constitutional rights by commenting on his post-arrest silence in direct violation of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Nevertheless, the State does not attempt to prove that the constitutional error was harmless beyond a reasonable doubt as required by *Chapman* v. *California*, 386 U.S. 18 (1967).[1] Instead, the State contends that this Court should abandon the *Chapman* standard and require the respondent to demonstrate "a reasonable likelihood, sufficient to undermine confidence in the result, that the prosecutor's violation of the rule of *Doyle* affected the outcome of the trial." (Brief of Petitioner at 36) However, because respondent would be entitled to relief even under the outcome determinative standard of review, it is unnecessary to reach the merits of the State's claim concerning the applicability of the *Chapman* doctrine. See *Milton* v. *Wainwright*, 407 U.S. 371,

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[1] While the State acknowledges that "[o]verwhelming evidence of guilt" is the "minimum requirement to prove harmlessness" (Brief of Petitioner at 31), petitioner does not argue that the evidence was overwhelming. In fact, the State concedes that "the balance of the State's case provided no direct corroboration for Williams's testimony that respondent participated in the murder . . ." (Brief of Petitioner at 39).

372 (1972) (applying harmless error analysis and "conclud[ing] that judgment under review must be affirmed without reaching merits of petitioner's claim.")

The trial was in essence a credibility contest between Miller and the prosecution's key witness, Randy Williams. Although Williams had confessed his involvement in the crimes, the State dismissed the murder, armed robbery, and aggravated kidnapping charges against him in exchange for his testimony. As the courts below have observed "nothing except Williams's testimony directly link[ed] Miller with the crimes." (A 4, 12; B 4, 8; D 11; E 6) Miller, testifying on his own behalf, vigorously disputed Williams's allegations and denied involvement in the crimes. Following the trial, the trial judge summarized the evidence as follows:

> We sat for nine days, listening to a lot of testimony but when you got right down to it, it was a swearing match between Mr. Williams and Mr. Miller.
>
> (Vol. X, R. 6)

As the trial judge also indicated, the outcome of the trial could have been different:

> Fortunately for the State, they believed their witness. Unfortunately for the defendant, they believed their witnesses. *Could have gone just the very opposite.*
>
> (JA 49) (emphasis added)

Because the trial was a credibility contest whose outcome could have gone either way, the prosecutor's impermissible attack upon Miller's credibility undermines confidence in the outcome of the trial. This conclusion is compelled by (A) the timing and nature of the *Doyle* violation; (B) the importance of respondent Miller's credibility to the outcome of the trial; and (C) the compelling reasons for disbelieving the accomplice testimony of Randy Williams.

A. The Prosecutor's Immediate And Direct Attack Upon Respondent's Credibility Through The Use Of Post-Arrest Silence Was Intolerably Prejudicial Because It Suggested That Respondent Had Fabricated His Exculpatory Testimony.

The prosecutor commenced his cross-examination of respondent Miller as follows:

> Q. Mr. Miller, how old are you?
>
> A. 23.
>
> Q. Why didn't you tell this story to anybody when you got arrested?
>
> (A 3)

Defense counsel immediately objected and moved for a mistrial. The judge denied the motion and instructed the jury to "ignore that last question for the time being." (JA 32) The judge did not further instruct the jury on the prosecutor's reference to Miller's post-arrest silence.

The prosecutor's reference to respondent's post-arrest silence is a tactic often used by prosecutors to shore up a weak case.[2] This tactic is used after the defendant offers an innocent explanation on direct examination. To impeach this exculpatory account, the prosecutor proves through cross-examination that the defendant never informed the arresting officers of his innocent story, thereby suggesting that his testimony was a fabrication concocted later. This Court has recognized that such

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[2] See Gershman, *Prosecutorial Misconduct*, §9.3 at 9-14 (1986) ("References by the prosecutor to the defendant's failure to explain his conduct to the police after arrest is a common abuse."); *United States* v. *Edwards*, 576 F.2d 1152, 1155 (5th Cir. 1978) (Prosecutor "apparently intend[ed] to shore up his less-than-overwhelming evidence by leading the jury to make inferences of guilt from defendant's silence.")

impermissible impeachment tactics are "intolerably" prejudicial. *United States* v. *Hale*, 422 U.S. 171, 180 (1975). As the Court stated:

> Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.
>
> *United States* v. *Hale*, 422 U.S. at 180.

This Court has also recognized that impeachment evidence "may make the difference between conviction and acquittal." *United States* v. *Bagley*, 87 L.Ed.2d 481, 490 (1985). As the Court stated in *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), "[t]he jury's estimate of the truthfulness and reliability of a given witness may be determinative of guilt or innocence . . ."

The prejudice was compounded in this case by the timing of the prosecutor's impermissible and unconstitutional inquiry. As the Court of Appeals emphasized below:

> No matter how many days the trial lasted or how many witnesses may have appeared, the jury will pay close attention when a defendant accused of crimes as horrible as these takes the stand. That attention undoubtedly is heightened when the prosecutor rises to attack the defendant's story on cross-examination.
>
> (A 12-13)

Thus, the Court of Appeals concluded:

> The prosecutor's improper inquiry, magnified by coming at a time when the jury's attention was focused on Miller, cast substantial doubt on Miller's credibility.
>
> (A 14)

The prejudice was further aggravated because the trial court instructed the jury to ignore the prosecutor's impermissible aspersion on Miller's credibility only "for the time being." (JA 32) As the Court of Appeals recognized, the trial judge's ambiguous instruction implied that the jury could subsequently consider the prosecutor's improper question:

> [W]e believe that the judge's admonition to ignore the prosecutor's reference to Miller's post-arrest silence "for the time being" was simply too ambiguous in the setting of a clear-cut *Doyle* violation to cure the effect of the prosecutor's improper comment. The record reflects that the judge was apparently unaware that the prosecutor's question was a violation of *Doyle*. At the side bar conference following defense counsel's objection to the prosecutor's comment, the judge stated: "I will do some checking during the time he is on the witness stand on Cross Examination and if I find where he can, I will let him ask the question."
>
> Thus, the instruction that the judge gave to the jury reflected what he apparently was thinking at the time, which was that the jury might be able to consider the prosecutor's comment and the implications arising therefrom at some point in the future.
>
> (A15)

Because of the importance of respondent's credibility to the outcome of the trial, it simply cannot be said that the flawed and ambiguous instruction in any way cured the prosecutor's misconduct. As Justice Simon of the Illinois Supreme Court emphasized in his dissent:

> The trial court only directed the jury to ignore the prosecutor's remarks *"for the time being."*

> Given that the trial was essentially a credibility contest between Williams and the defendant, this opaque instruction did not render the prosecutor's remarks harmless error. It did not prevent the prosecutor's highly questionable cross-examination tactic from infecting the defendant's entire testimony and lowering its value to the jury.
>
> (D 13) (emphasis added)

In *Stewart* v. *United States*, 366 U.S. 1 (1961), the defendant, who had declined to testify at his first two trials, took the stand at the third. On cross-examination, after the defendant admitted that he had been "tried on two other occasions," the prosecutor asked: "This is the first time you have gone on the stand, isn't it?" The Court found the question improper and concluded that the error was not harmless. Speaking of a potential cautionary instruction to the jury, such as the one given in this case, the Court said:

> [T]he danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's prior failure to testify.
>
> 366 U.S. at 10.

Therefore, it is clear that the prosecutor's impermissible attack on Miller's credibility—magnified by coming at a time when the jury's attention was focused on Miller, highlighted by defense counsel's forced objection, and aggravated by the ambiguous instruction—was intolerably prejudicial.

B. The Prejudicial Impact Of The Prosecutor's Unconstitutional Attack On Respondent's Credibility Was Intolerable In This Case Because The Outcome Of The Trial Depended On The Jury's Assessment Of Respondent's Credibility.

During his closing argument to the jury, the prosecutor acknowledged that:

> It really boils down to, who told you the story here and who told you the truth? You either believe Randy Williams or you believe Chuck Miller. That is your choice. It is as simple as that.
>
> (Vol. VII, R. 174)

Accordingly, the trial judge found that:

> Nothing complex about the trial; the trial actually, was a swearing match. You had two witnesses, when-you got right down to it. All the rest was dressing . . .
>
> (JA 49)

The Illinois Appellate Court held:

> The trial was essentially a credibility contest between defendant Miller and Randy Williams. The reference to post-arrest silence cast aspersions on Miller's credibility and may have irreparably prejudiced him in the eyes of the jury.
>
> (E 7)

Justice Simon of the Illinois Supreme Court stated:

> The jury had the sole responsibility for resolving the sharp conflict between the testimony of Williams and the testimony of the defendant. The resolution of this conflict depended totally upon the jury's assessment of the defendant's credibility, for the other evidence could have fairly supported either the defendant's or Williams's story.
>
> (D 12) (dissenting opinion)

And the Court of Appeals concluded:

> Because the crucial issue at trial was credibility, the *Doyle* violation went to the heart of the truth-seeking process.
>
> (A 16)

Therefore, because the outcome of the trial depended on the jury's assessment of Miller's credibility, the prejudicial impact of the prosecutor's impermissible inquiry was intolerable.

C. Since The Accomplice Testimony Of Randy Williams Was Impeached, Severely Discredited By Other Evidence, And Lacked Material Corroboration, A Reasonable Likelihood Exists That The Prosecutor's Misconduct Affected The Outcome Of The Credibility Contest Between Respondent And Williams.

Although Randy Williams had confessed to the crimes, the State dismissed murder, armed robbery, and aggravated kidnapping charges against him in return for his testimony. Williams subsequently pled guilty to kidnapping and was sentenced to two years probation. The State's case against respondent Miller was entirely dependent upon Williams's testimony.

Williams testified that he, his brother Rick, and Butch Armstrong met Neil Gorsuch in a tavern. The four men left together at about 1:30 a.m. After taking Rick home, Williams drove around while Armstrong battered Gorsuch in the back seat of the car. They proceeded to Williams's residence after covering Gorsuch's head and face with a stocking hat. After arriving at Williams's residence, Armstrong beat Gorsuch again and armed himself with Williams's .32 caliber revolver and twelve gauge shotgun. The three men got back into the car and drove to the trailer home where Miller was staying. While Williams and Gorsuch waited in the car, Armstrong went in and talked briefly to Miller. Armstrong and Miller then left the trailer and got into the car. Williams drove to a bridge in an isolated rural area, where Armstrong removed Gorsuch from the car and stood him up against the bridge railing. Williams, Armstrong, and Miller then each shot Gorsuch once in the head with the shotgun, and

Armstrong pushed the body over the railing into the creek below.

Respondent Miller, testifying in his own behalf, vigorously disputed Williams's story. Miller stated that Armstrong and Miller came to the trailer for advice *after* they had committed the murder. Miller testified that the pair told him that Williams had beaten Gorsuch with a pair of "numchucks" and that Gorsuch had been shot to prevent him from going to the police.

While there were no compelling reasons to doubt Miller's testimony, the accomplice testimony of Williams was riddled with infirmities. As Justice Simon of the Illinois Supreme Court indicated, such testimony is inherently suspect:

> Accomplice testimony of this kind is inherently unreliable as it often may be motivated by pressures other than the witness' desire to tell the truth, "such as a promise of leniency or immunity and malice toward the accused."
>
> (D 11-12) (dissenting opinion)

The State reasons that Williams had no reason to lie about Miller's involvement in the murder because Williams "could have negotiated an agreement based on his testimony against Armstrong alone." (Brief of Petitioner at 39) However, it must be remembered that Williams had confessed his involvement in the crime to Miller. Thus, Miller was a potential threat to Williams's liberty because of his knowledge of Williams's criminal involvement. Moreover, at the time of Williams's arrest the police had three suspects: Williams, his brother Rick, and Armstrong. By implicating Miller, Williams exculpated his brother Rick.[3]

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[3] The record indicates that after Randy Williams implicated respondent and Armstrong, Rick Williams was eliminated as a suspect. (C. 557)

In addition to being subject to suspicion, Williams's testimony was discredited by other evidence introduced at trial. For instance, Williams testified that Gorsuch was shot from a distance of ten to twelve feet. However, the pathologist who performed the autopsy, testifying on behalf of the prosecution, offered his expert opinion that the shotgun was in contact with Gorsuch's head when the shots were fired.

Expert testimony also indicated that Gorsuch was not shot at the bridge as Williams alleged. Further expert testimony revealed that Gorsuch could have died as a result of a blow to the head by a pair of numchucks. Although Williams was skilled in the use of martial arts weapons known as numchucks and had three pairs of numchucks hanging on the wall of his residence, he denied that he had used them to strike Gorsuch.

Furthermore, all the physical evidence presented at trial linked Williams, but not Miller, to the crimes. For example, the numchucks belonged to Williams; the revolver belonged to Williams; the shotgun used to kill Gorsuch belonged to Williams; the house where the beating occurred belonged to Williams; and the vehicle which was used to transport Gorsuch to the bridge was driven by Williams and belonged to his brother's girlfriend.

Finally, Williams's testimony concerning Miller's involvement in the crimes was not substantially corroborated. As the Court of Appeals held:

> With regard to the crucial part of Williams's testimony—his assertion that Miller took part in the murder of Neil Gorsuch—there was no direct corroborative evidence and Miller denied being present when the murder was committed.
>
> (A 13-14)

While the State notes that "Rick Williams did corroborate his brother's testimony when he testified that respondent admitted participating in the murder" (Brief of Petitioner at 37, n.6), it is also noteworthy that the Williams brothers were both impeached on this point and Miller denied being present when the alleged conversation took place. Rick testified that on the evening following the murder, Randy Williams and Miller told him that they had killed Gorsuch. However, on cross-examination, Rick identified a signed statement which he had given to the police on the day after the alleged conversation. The statement contained the following colloquy:

> POLICE: Rick, did Randy tell you anything last night about what happened after you were dropped off?
>
> ANSWER: All that he said was that he might be in big trouble. I don't really understand if he was in trouble or somebody else was in trouble—someone else was bein[g] in trouble.

Rick testified that he had lied when giving the foregoing statement. Rick also testified that he had also lied when he told the police that Neil Gorsuch was not with them when he, his brother, and Butch Armstrong had left the Regulator Tavern Friday night.

Moreover, Randy Williams had also neglected to mention the alleged conversation with Miller to the police. In fact, Randy Williams specifically advised the police that the only thing he had informed his brother was that "I think I might be in trouble." Randy Williams further testified that he had lied when he had given that statement.

The foregoing review of Williams's testimony casts substantial doubt on his assertion that Miller had been

involved in the crime. Significantly, the prosecutor's comments during closing argument reveal that he was well aware of the infirmities inherent in Williams's testimony:

> Randy Williams got a deal; he got the charges of murder dropped against him.
>
> Sure he was wrong in details; sure, he left some things out; sure, his statement is confusing; sure, he lied at that time about not being with his brother as they left the Regulator Tavern . . .
>
> (JA 45-46)

Cognizant of the weakness of his case, the prosecutor took a calculated risk and impermissibly attacked respondent's credibility in direct violation of *Doyle* v. *Ohio*. Implicit in the prosecutor's assumption of the risk of being overturned on appeal was the recognition that his misconduct could affect the outcome of the trial.

For these reasons, the prosecutor's impermissible attack on respondent Miller's credibility "undermine[s] confidence in the outcome" of the trial. (Brief of Petitioner at 24) Consequently, the judgment of the Court of Appeals granting respondent Miller a new trial should be affirmed without reaching the State's remaining arguments.

II. THE HARMLESS ERROR STANDARD OF *CHAPMAN* v. *CALIFORNIA* APPLIES TO FEDERAL CONSTITUTIONAL ERRORS, INCLUDING VIOLATIONS OF *DOYLE* V. *OHIO*.

In *Chapman* v. *California*, 386 U.S. 18, 24 (1967), the Court held that before a federal constitutional error can be held harmless, the benficiary of the error must prove beyond a reasonable doubt that the error did not contribute to the verdict. As the Court stated:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.
>
> 386 U.S. at 24.

The State has acknowledged that the prosecutor injected constitutional error into Miller's trial by commenting upon respondent's *Miranda* (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)) warnings silence in direct violation of this Court's decision in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). However, despite being both the source and the beneficiary of the error, the State argues that the burden should be on respondent to establish outcome determinative prejudice.

The standard of harmless error review proposed by the State requires a defendant to prove that he would probably have been acquitted had the prosecutor not injected constitutional error into the trial. However, this type of proposal has been authoritatively condemned as an impermissible function of harmless error analysis. As the Court stated in *Kotteakas* v. *United States*, 328 U.S. 750, 764 (1946):[4]

> [I]t is not the appellate court's function to determine guilt or innocence.
>
> * * * *
>
> The question was not [whether the jury was] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had upon the jury's decision. The crucial thing is the

[4] In the State's petition for certiorari, the State argued that *Doyle* should be governed by the *Kotteakas* standard of harmless error review. Following the grant of certiorari, the State abandoned this argument.

impact of the thing done wrong on the minds of other men, not one's own, in the total setting.

Recently, in *Delaware* v. *Van Arsdall*, 89 L.Ed.2d 674, 683 (1986), this Court rejected the State's suggestion that the outcome determinative prejudice standard should be applied to violations of the Confrontation Clause.

Nevertheless, the State maintains that this Court's precedents mandate the application of the outcome determinative prejudice standard of review to violations of the Due Process Clause. As an ancillary position, the State intimates that violations of *Doyle* are not sufficiently egregious to justify application of the *Chapman* harmless beyond a reasonable doubt standard of review.

A review of the State's arguments reveals that (A) the outcome determinative prejudice standard is inapplicable to identifiable constitutional errors; (B) *Doyle* violations are constitutional errors of the most basic sort; and (C) significant policy and constitutional considerations militate against the abandonment of the *Chapman* standard.

A. Since The Requirement Of Actual Prejudice Relates Only To The Necessity Of Establishing An Error Of Constitutional Dimension, It Is Unnecessary To Prove Actual Prejudice In Addition To Identifying A Federal Constitutional Error.

The State reasons that when errors are "alleged" under the Due Process Clause "actual prejudice"[5] must be shown "in order to elevate them to the level of a constitutional violation." (Brief of Petitioner at 20) However, as

[5] As used by the State, "actual prejudice" is a generic term encompassing a variety of standards. Petitioner ultimately defines "actual prejudice" as a requirement that the victim of the constitutional violation prove that "but for the error" the outcome probably would have been different. (Brief of Petitioner at 20-24)

the State's reasoning implies, this is the standard for determining whether ordinarily nonconstitutional trial error is so prejudicial as to rise to the level of a constitutional violation. Since the State has conceded that a federal constitutional violation occurred in this case, the *Chapman* standard of review applies. See *Rushen* v. *Spain*, 464 U.S. 14 (1983) (applying *Chapman* standard where the State conceded that the error was of constitutional dimension).

The distinction between the application of the actual prejudice standard and the *Chapman* standard, in the context of improper prosecutorial comment, is exemplified by comparing *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974) and *Darden* v. *Wainwright*, 106 S.Ct. 2426 (1986) with *Griffin* v. *California*, 380 U.S. 609 (1965). In *Donnelly* and *Darden* the comments, while improper, were not *per se* violative of the Constitution. Thus, the defendants were required to show actual prejudice. However, in *Griffin* v. *California*, 380 U.S. 609 (1965), the *Chapman* standard applied because the prosecutor's comments violated the defendant's constitutional right to remain silent under the Fifth Amendment. As the Court of Appeals explained below:

> Once the trial error has been identified as one of constitutional magnitude, then the *Chapman* standard is applied to determine whether the conviction must be reversed.
>
> *Donnelly* itself made clear this scheme, explaining that the habeas petitioner there could point to nothing in his trial that specifically violated the constitution, such as prosecutorial comments on his right to remain silent. Instead, the petitioner complained of the prosecutor's expression of personal opinion as to guilt, an error that would not implicate the petitioner's fourteenth amendment right to due

process unless it actually "infected the trial with unfairness."

Thus, the petitioner has an uphill battle when he seeks to establish general trial error as constitutional error. But where the violation at trial is one of constitutional magnitude, then the government bears the "more onerous" burden of *Chapman*. (Citation)

(A 9) (citations omitted)

The other cases cited by petitioner in support of the actual prejudice standard are distinguishable on the same basis. For instance, in *United States* v. *Bagley*, 105 S.Ct. 3375 (1985), the Court was urged to reverse automatically or apply the *Chapman* standard to the government's failure to disclose impeachment material to the defendant. The Court explained that a threshold inquiry first had to be undertaken to determine whether the nondisclosure amounted to a constitutional violation: "such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." 87 L.Ed.2d at 491. However, compare *Napue* v. *Illinois*, 360 U.S. 264 (1959), where the Court held that the knowing use of perjured testimony violated due process. Since this was a constitutional error *per se*, the defendant was not required to show actual prejudice. Instead, the Court merely inquired as to whether the false testimony "may have had an effect on the outcome of the trial."[6] *Napue* v. *Illinois*, 360 U.S. at 272.

In *Simmons* v. *United States*, 390 U.S. 377 (1968), *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), and *Neil* v.

[6] Although *Napue* antedated *Chapman*, this Court has recognized that there is little, if any, difference between the harmless error rule applied in *Napue* and the *Chapman* "harmless beyond a reasonable doubt" standard. *See Chapman* v. *California*, 386 U.S. 18, 24 (1967); *United States* v. *Bagley*, 87 L.Ed.2d 481, 492 at n. 9 (1985).

Biggers, 409 U.S. 188 (1972), the defendants alleged that they were denied due process because the police employed suggestive identification procedures. Since *Stoval* v. *Denno*, 388 U.S. 293, 302 (1967) held that due process is not violated unless the identification procedure was "unnecessarily suggestive" and "conducive to irreparable misidentification," a threshold inquiry had to be undertaken in these cases to determine if the defendants had established a constitutional violation. However, if the defendant can identify an error of constitutional magnitude such as the deprivation of counsel at a post-indictment lineup, the threshold inquiry is unnecessary and the *Chapman* standard applies. *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977).

Similarly, before a defendant can prevail on a claim that he was convicted pursuant to an erroneous jury instruction, it must be established that the instruction "violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp* v. *Naughten*, 414 U.S. at 146 (1973). Accordingly, unless the defendant can identify a specific due process violation such as a burden shifting presumption (*Rose* v. *Clark*, 92 L.Ed.2d 460 (1986)), actual prejudice must be shown to elevate the error to the level of a constitutional violation. *Cupp* v. *Naughten*, 414 U.S. at 146-147; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

Holbrook v. *Flynn*, 89 L.Ed.2d 525 (1986), in which uniformed guards were present in the courtroom during the defendant's trial, is another example of a set of facts which does not disclose a constitutional violation *per se*. The Court held that because the presence of uniformed guards does not necessarily violate due process, the defendant was required to show actual prejudice in order to establish a constitutional violation. In contrast to *Flynn* is *Rushen* v. *Spain*, 464 U.S. 114 (1983) where the

State conceded that undisclosed *ex parte* communications between the judge and a juror constituted constitutional error. Accordingly, the Court held that the *Chapman* standard was applicable. 464 U.S. at 120.

Finally, the State cites *Strickland* v. *Washington*, 466 U.S. 668 (1984) where the Court held that the defendant must show actual prejudice in order to establish a violation of the Sixth Amendment right to effective assistance of counsel. As in the other cases relied on by the State, this is a threshold inquiry into whether a constitutional violation has been established. Because attorney errors are difficult to define (466 U.S. at 693), the defendant is required to show actual prejudice so as "to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not." 466 U.S. at 703 (Brennan, J. concurring) Because the government is not responsible for errors by defense attorneys (466 U.S. at 693), the burden is shifted to the defendant to show that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

The reasoning underlying the *Strickland* decision is inapplicable to violations of *Doyle* v. *Ohio*. Unlike claims of ineffective assistance of counsel, comments on a defendant's *Miranda* warnings silence are easily identified. Moreover, because the prosecution is directly responsible for such comments, *Doyle* violations are easy for the government to prevent. *See Strickland* v. *Washington*, 466 U.S. at 692.

The foregoing analysis reveals that the *Chapman* standard applies to "federal constitutional error" (*Chapman* v. *California* 386 U.S. at 24), including identifiable violations of the Fourteenth Amendment (*Napue* v. *Illinois*,

360 U.S. at 272; *Rose* v. *Clark*, 92 L.Ed.2d at 471; *Rushen* v. *Spain*, 464 U.S. at 120). Thus, the relevant distinction for harmless error review is not between the various provisions of the Constitution as the State suggests, but between those errors which can be identified as constitutional violations *per se* and those that can not.

B. Prosecutorial Comment Upon An Accused's *Miranda* Warnings Silence Is Fundamentally Unfair And Patently Unconstitutional.

In *Doyle* v. *Ohio*, 462 U.S. 610 (1976), the Court held that a defendant's silence at the time of arrest and after receiving *Miranda*[7] warnings could not be used to impeach his testimony at trial. The Court reasoned that because *Miranda* warnings implicitly assure the arrestee that his silence will not later be used against him, it would be fundamentally unfair and a violation of due process to allow the government to subsequently impeach the defendant with *Miranda* warnings silence.

Arguing that the reasoning underlying *Doyle* was "explicitly retracted" in *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the State concludes that *Neville* and other decisions following *Doyle* have established that "[w]hile a broken promise may be cause for concern, it does not necessarily follow that fundamental fairness has been denied." (Brief of Petitioner at 25, 28) However, a review of the relevant authorities reveals that this Court has continued to reiterate the view that *Doyle* rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then

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[7] *Mirandi* v. *Arizona*, 384 U.S. 436, 478-479 (1966), mandates that before an individual is subjected to custodial interrogation he must be warned that "he has the right to remain silent, that anything he says can be used against him in a court of law. . ."

using his silence to impeach an explanation subsequently offered at trial." *South Dakota* v. *Neville*, 459 U.S. at 565.

For instance, in *Jenkins* v. *Anderson*, 447 U.S. 231, 240 (1980), while holding that impeachment with pre-arrest silence is permissible, the Court emphasized that no government action had induced the defendant to remain silent. In *Anderson* v. *Charles*, 447 U.S. 404, 407-408 (1980), the Court explained that the use of silence for impeachment was fundamentally unfair in *Doyle* because:

> *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that silence will not be used against him . . . *Doyle* bars the use of silence maintained after the receipt of government assurances.

Fletcher v. *Weir*, 455 U.S. 603, 606 (1982) also confirmed the unfairness of using silence to impeach a defendant when that silence was induced by government action. Accordingly, in *Greenfield* v. *Wainwright*, 88 L.Ed.2d 623, 630 (1986), this Court recently concluded that:

> *Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that Due Process requires.

The State's suggestion that *Doyle* violations are insignificant infractions undeserving of constitutional status is further refuted by *Doyle's* recognition that silence in the wake of *Miranda* warnings may be nothing more than an exercise of an arrestee's constitutional rights. *Doyle* v. *Ohio*, 426 U.S. at 617. Consequently, for the government to subsequently impeach the defendant with evidence of *Miranda* warnings silence is a due process violation "of the most basic sort." *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). As this Court has stated:

> [F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."
>
> *Bordenkircher* v. *Hayes*, 434 U.S. at 363 quoting *Chaffin* v. *Stynchome*, 412 U.S. 17, 32-33 (1977).

Indeed, prosecutorial comment upon a defendant's *Miranda* warings silence is no less egregious than comment upon a defendant's failure to take the stand and testify in his own behalf. In *Griffin* v. *California*, 380 U.S. 609, 614 (1965), the Court held that the Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and prevents the prosecution from commenting on the silence of a defendant who asserts that right. While it is clear that a defendant who takes the stand waives his Fifth Amendment privilege (*Raffel* v. *United States*, 271 U.S. 494 (1926)), it is equally clear that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his [Fifth Amendment] privilege." *Moran* v. *Burbine*, 89 L.Ed.2d 410, 441 (1986). Thus, where a defendant takes the stand after the State has promised not to use his *Miranda* warnings silence against him, the State's subsequent breach of that promise renders the defendant's waiver of his Fifth Amendment privilege involuntary.

The State further asserts that notwithstanding the fundamental unfairness inherent in prosecutorial comment upon *Miranda* warnings silence, such comment should be allowed because it is probative of the defendant's credibility.[8] However, *Doyle* recognized that

[8] Although the State of Illinois claims that post-arrest silence is probative, the Illinois Supreme Court has long recognized that "evidence of defendant's post-arrest silence is inadmissible because such evidence is neither material nor relevant having no tendency to prove or disprove the charge against a defendant." *People* v. *McMullin*, 138 Ill.App.3d 872, 486 N.E.2d 412, 415 (2d Dist. 1985), citing *People* v. *Lewerenz*, 24 Ill.2d 295, 299, 181 N.E.2d 99 (1962); *People* v. *Rothe*, 358 Ill. 52, 57, 192 N.E. 77 (1934).

Miranda warnings silence is "insolubly ambiguous" because silence in the wake of these warnings may be nothing more than the arrestee's exercise of the *Miranda* rights. Indeed, as this Court recently emphasized, "*Miranda* warnings may inhibit persons from giving information." *Oregon* v. *Elstad*, 84 L.E.2d 222, 232 (1985). Moreover, although the State asserts that "subsequent cases abandon this strand of *Doyle's* rationale" (Brief of Petitioner at 24), this Court recently emphasized that just what induces *Miranda* silence "remains as much a mystery today" as it did at the time of *Doyle*. *Wainwright* v. *Greenfield*, 88 L.Ed.2d at 632 n. 11. "Silence in the face of an accusation is an enigma and . . . is not determinative of one's guilt." *Wainwright* v. *Greenfield*, 88 L.Ed.2d at 632 n. 11.

Finally, the State asserts that Miller's trial was fundamentally fair because the prosecutor's unconstitutional attack on Miller's credibility did not undermine the process of adjudication. This argument simply does not comport with the prosecutor's acknowledgement that the resolution of Miller's guilt was dependent upon the jury's assessment of Miller's credibility. As the prosecutor stated during closing argument:

> You either believe Randy Williams or you believe "Chuck" Miller. That is your choice. It's as simple as that.
>
> (Vol. VII, R. 73)

Under these circumstances, the *Doyle* violation had a direct effect on the outcome of the trial. As the Court of Appeals concluded:

> Because the crucial issue at trial was credibility, the *Doyle* violation went to the heart of the truth-seeking process.
>
> (A 16)

Significantly, the State has not even attempted to meet the *Chapman* requirement of proving beyond a reasonable doubt that the unconstitutional comment "did not contribute to the verdict obtained."[9] 383 U.S. at 24. It is a contradiction in terms to argue that while the error may have contributed to the conviction, it had "nothing to do with the process of adjudicating guilt or innocence." (Brief of Petitioner at 28.)

C. The Abandonment Of The *Chapman* v. *California* Harmless Error Standard Would Frustrate Deterrence And Compound The Underlying Constitutional Violation.

In *Chapman*, the Court recognized that "harmless error rules can work very unfair and mischievous results" unless they are narrowly circumscribed. 383 U.S. at 24. Accordingly the Court placed the burden on the beneficiary of the error to prove that it was harmless beyond a reasonable doubt. Complaining that the *Chapman* standard is too "stringent" (Brief of Petitioner at 13), the State proposes that the prosecutor should be allowed to inject *Doyle* error into the trial, and then shift the burden to the defendant to affirmatively prove outcome determinative prejudice. However, the abandonment of the *Chapman* standard, in addition to creating an unacceptable risk of affirming a judgment which was influenced by constitutional error, would frustrate deterrence and compound the underlying constitutional violation.

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[9] The State acknowledges that "[o]verwhelming evidence of guilt . . . is the minimum requirement to prove harmlessness." (Brief of Petitioner at 31.) However, the State has not suggested that the evidence against Miller was overwhelming. Indeed, the State concedes that there was "little in the way of corroboration for Randy Williams' testimony" that Miller was involved in the crime. (Brief of Petitioner at 37)

Prosecutorial comment on *Miranda* warnings silence is a recurrent problem. Notwithstanding the constitutional prohibition against the use of such inadmissible evidence, courts have expressed concern and alarm over the increasing tendency of prosecutors to deliberately violate a defendant's constitutional rights. *See United States* v. *Wycoff*, 545 F.2d 679, 682 (6th Cir. 1976); *State* v. *Williams*, 64 Ohio.App.2d 271, 413 N.E.2d 1212, 1216, n.3 (1979). If the harmless error standard is diluted, it would only further encourage prosecutors to flaunt the *Doyle* ruling.

In fact, it appears that this is exactly what happened in this case. At trial, the prosecutor took a calculated risk by commenting upon respondent's *Miranda* silence in an attempt to shore up the State's less than overwhelming case. On appeal, the State has not only attempted to seek sanctuary in the doctrine of harmless error, but has argued that the burden should be on respondent to prove that he probably would have been acquitted absent the prosecutor's misconduct. Thus, it is clear that the prosecutor must be held accountable for his misconduct by being required to prove that the constitutional violation was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. at 24.

Furthermore, it would be inconsistent with the guarantee of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment to require the victim of a constitutional error to establish outcome determinative prejudice. As the Court emphasized in *Chapman:*

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.

386 U.S. at 24.

For these reasons, it is clear that the *Chapman* harmless error standard must be applied to violations of *Doyle* v. *Ohio*.

III. SINCE THE HARMLESS ERROR RULE OF *CHAPMAN* v. *CALIFORNIA* AND THE WRIT OF HABEAS CORPUS SHARE A CENTRAL CONCERN FOR FUNDAMENTAL FAIRNESS, THERE IS NO REASON TO ABANDON THE *CHAPMAN* STANDARD ON HABEAS REVIEW.

In *Chapman* v. *California*, 386 U.S. 18, 21 (1967), the Court held that when constitutional rights are violated the question of harmlessness is a federal question governed by federal law:

> Whether a conviction for a crime should stand when a state has failed to accord federally constitutionally guaranteed rights is every bit as much a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.
>
> 386 U.S. at 21.

Accordingly, the Court concluded that "before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 25. Since *Chapman*, this Court has applied the harmless beyond a reasonable doubt standard to direct and collateral review alike. *See Rose* v. *Clark*, 92 L.E.2d 460, 469 (1986) (citing cases) Nevertheless, while acknowledging that the states are required to apply the federal harmless error standard on direct review, the State argues that a less stringent standard should be applied on federal habeas review.

The State's argument overlooks the fundamental principle underlying our federal system:

> Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution."
>
> *Rose* v. *Lundy*, 455 U.S. 509, 517 (1982) quoting *Ex parte Royall*, 117 U.S. 241, at 251 (1886).

In 28 U.S.C. § 2254, Congress has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. Thus, "[i]f the States withhold effective remedy, the federal courts have the power and duty to provide it." *Fay* v. *Noia*, 372 U.S. 391, 441 (1963).

The *Chapman* standard provides an effective remedy while also balancing competing interests. Although the State asserts that the *Chapman* standard does not take into account the problems associated with collateral review, it is clear that the *Chapman* standard and the writ of habeas corpus share a central concern for fundamental fairness. Recently, in the context of habeas corpus review, this Court reaffirmed the "strong interests" that support the *Chapman* rule:

> The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.
>
> *Rose* v. *Clark*, 92 L.Ed.2d 460, 470 (1986).

Chapman's focus on the underlying fairness of the trial comports with the principal concerns of habeas corpus. As the State notes:

> The principle concern for the writ of habeas corpus is the fundamental fairness of the judgment by which the State seeks to maintain an individual in custody.

> Brief of Petitioner at 41.

Despite this common concern for fundamaental fairness, the State concludes that the *Chapman* standard should be abandoned on habeas review. The State reasons that concerns for comity and finality require that the burden be shifted to the victim of the constitutional error to affirmatively prove outcome determinative prejudice. In examining the State's argument, respondent will demonstrate that (A) the minimal costs associated with collateral review do not outweigh respondent's interest in obtaining a fair trial; (B) the application of the outcome determinative test to harmless error analysis would be fundamentally unfair and judicially unsound; and (C) the application of the outcome determinative standard would undermine the intent of Congress.

A. The Minimal Costs Associated With Collateral Review Do Not Outweigh The Respondent's Interest In Obtaining A Fair Trial.

The State argues that *Chapman's* "policy of strict enforcement of constitutional rights on collateral review" is outweighed by the competing interests of comity and finality. (Brief of Petitioner at 29, 33) However, the State's argument proceeds from a faulty premise because by rejecting a *per se* rule of automatic reversal, the *Chapman* Court specifically declined to adopt a "policy of strict enforcement." Instead, the Court recognized that in the context of a particular case, certain constitutional errors may have been "harmless" in terms of their effect on the fact finding process. The Court concluded that the beneficiary of the constitutional error would be allowed to avoid "reversal of his erroneously obtained judgment" if he could show that the error was harmless beyond a reasonable doubt. 386 U.S. at 24. Thus, rather than competing with state interests, the *Chapman* rule actually

saves the time, effort and expense of unnecessary retrials where the defendant has not been prejudiced by the error.

Moreover, contrary to the State's assertions, "few defendants prevail in federal habeas corpus proceedings . . ." *Phelps* v. *Duckworth*, 772 F.2d 1410, 1419 (7th Cir. 1985) (concurring opinion) "It is the occasional abuse that the writ of habeas corpus stands ready to correct." *Jackson* v. *Virginia*, 443 U.S. 307, 322 (1979). And in those few cases where habeas relief is granted, the remedy under *Chapman* is not a "windfall" for the defendant as the State suggests. (Brief of Petitioner at 31) "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for the State may . . . try him again by the procedure which conforms to constitutional requirements." *Rose* v. *Mitchell*, 443 U.S. 545, 558 (1979) quoting *Hill* v. *Texas*, 316 U.S. 400, 406 (1942).

For these reasons, it is clear that the State has overstated the costs associated with the *Chapman* standard of harmless error review. Relying on these exaggerated costs, the State concludes that the interests of comity and finality preclude application of the *Chapman* standard on collateral review. However, as the Court has recognized.

> [T]he problems of finality and federal-state comity arise whenever a state prisoner invokes the jurisdiction of a federal court to redress an alleged constitutional violation.
>
> *Jackson* v. *Virginia*, 443 U.S. 307, 322 (1979).

Thus, unless the State is suggesting that the outcome determinative test would preclude habeas relief altogether, these problems would not be solved by abandoning the *Chapman* standard. As the Court of Appeals stated:

> Unless we are to conduct our own cost/benefit analysis and declare habeas relief a thing of the past, this [harmless beyond a reasonable doubt] inquiry remains our responsibility.
>
> (A 12)

In support of its argument, the State relies on cases that have balanced competing interests with respect to claims that were procedurally defaulted in state court. See e.g., *Murray* v. *Carrier*, 91 L.Ed.2d 397 (1986); *Wainwright* v. *Sykes*, 433 U.S. 71 (1977); *Engle* v. *Issac*, 456 U.S. 107 (1982). These cases recognize that the State's interest in the finality of its judgments would be undermined if the federal courts were too free to ignore procedural forfeitures in state court. *Murray* v. *Carrier*, 91 L.ED.2d at 429. Thus, these decisions are consistent with the doctrine of comity which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass on the matter." *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982) quoting *Darr* v. *Buford*, 339 U.S. 200, 204 (1950). However, this concern is not present here where respondent preserved his constitutional claim in state court and exhausted state remedies prior to seeking haeas review.

The State also relies heavily on the rationale of *Stone* v. *Powell*, 428 U.S. 465 (1976). In *Stone*, the Court barred habeas review of Fourth Amendment challenges by prisoners who had been afforded an opportunity for full and fair litigation of their search and seizure claims in state court. However, the Court expressly stated that its decision "[was] *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutinal claims generally." 428 U.S. at 495, n. 37 (emphasis in original). Rather, the Court simply "reaffirm[ed] that the exclusionary rule is a judicially created remedy rather than a personal constitutional right" and emphasized "the

minimal utility of the [exclusionary] rule" in the context of federal collateral procedings. 428 U.S. at 495, n. 37. Subsequent cases have restricted the *Stone* rationale to Fourth Amendment exclusionary rule claims and have repeatedly refused to extend its limitations on federal habeas review to any other context. *Kimmelman* v. *Morrison*, 91 L.Ed.2d 305 (1986) (declining to extend *Stone* to ineffective assistance of counsel claims alleging counsel's failure to litigate adequately a Fourth Amendment claim); *Rose* v. *Mitchell*, 443 U.S. 545 (1979) (declining to extend *Stone* to claims of racial discrimination in selection of grand jury foremen); *Jackson* v. *Virginia*, 443 U.S. 307 (1979) (declining to extend *Stone* to claims by state prisoners that the evidence in support of their convictions was not sufficient to permit a rationale trier of fact to find guilt beyond a reasonable doubt, as required by *In re Winship*, 397 U.s. 358 (1970)).

Moreover, in contrast to the habeas petitioner in *Stone*, who sought merely to avail himself of the exclusionary rule, respondent Miller seeks direct federal habeas protection of his right to a fair trial. The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Drope* v. *Missouri*, 420 U.S. 162 (1975). "[T]his court has left no doubt that the probability of the deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

For these reasons, it is clear that the problems of comity and finality simply do not outweigh the respondent's interest in obtaining a fair trial and "Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners." *Reed* v. *Ross*, 468 U.S. 1, 10 (1984). While retrial sometimes will occur in cases such as this where the prosecutor has injected constitutional error into the trial, the additional costs of the

new trial are directly attributable to the prosecutor's misconduct and not to the writ itself:

> Official overzealousness of the type which violates the petitioner's conviction below has only deleterious effects. Here it has put the state to the substantial additional expense of prosecuting the case through the appellate courts and, now, will require even a greater expenditure in the event of a retrial, as is likely.
>
> But it is the deprivation of the protected rights themselves which is fundamental and the most regrettable, not only because of the effect on the individual defendant, but because of the effect on our system of law and justice.
>
> *Haynes* v. *Washington*, 373 U.S. 503, 519 (1963).

B. It Would Be Fundamentally Unfair And Judicially Unsound To Require The Victim Of Federal Constitutional Error To Establish Outcome Determinative Prejudice.

The State argues that while the *Chapman* standard applies on direct review, a different standard should be applied on collateral review. Relying on *Strickland* v. *Washington*, 466 U.S. 668 (1984), the State asserts that victims of constitutional errors must establish outcome determinative prejudice prior to obtaining habeas corpus relief. However, not only is the State's reliance on *Strickland* misplaced, the application of the outcome determinative standard would be fundamentally unfair and judicially unsound.

In *Strickland*, the Court held that when a defendant alleges ineffective assistance of counsel, he must demonstrate outcome determinative prejudice in order to establish a constitutional violation. The Court reasoned that because attorney errors are difficult to define and impossible for the government to prevent, the burden should be

on the defendant to establish prejudice. The Court concluded that the same standard should be applied on direct and collateral review alike. 466 U.S. at 697-698.

Thus, *Strickland* simply does not support the State's argument that different standards should apply on direct and collateral review. Moreover, *Strickland* concerned the threshold requirements for establishing an error of constitutional dimension, rather than the remedy to be applied to the constitutional violation itself. Finally, the outcome determinative standard announced in *Strickland* was premised on the rationale that the government should not be held accountable for defense counsel's errors. This rationale is obviously inapplicable in the present case where the prosecutor injected the constitutional error into the trial.

Under the circumstances of this case, where the State was both the source and the beneficiary of the error, it would be fundamentally unfair to require the victim of the constitutional error to establish outcome determinative prejudice in federal court. As the Court emphasized in *Chapman*:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.
>
> 386 U.S. at 24.

Unlike the *Chapman* standard, the outcome determinative test simply creates too great a risk of affirming a judgment that was influenced by error.

Furthermore, the outcome determinative standard, as applied to harmless error review, usurps the function of the jury by requiring the reviewing court to determine whether the defendant probably would have been acquitted had not the prosecutor injected constitutional error into the trial. As the Court has recognized, "the federal courts do not sit to re-try state cases de novo, rather, to review for violation of federal constitutional standards." *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972). Unlike *Strickland*, in this case it has already been established that the Constitution was violated. Under these circumstances, "it is not the appellate court's function to determine guilt or innocence." *Kotteakas* v. *United States*, 328 U.S. 750, 764 (1946).

The protection of constitutional rights, as well as the development of a coherent doctrine of harmless error, also militate against the application of the outcome determinative test. *In re Winship*, 397 U.S. 358 (1970) held that an accused cannot be convicted unless the trier of fact is convinced beyond a reasonable doubt that the accused is guilty as charged. It has been observed that in order to maintain the integrity of the *Winship* standard, reviewing courts must utilize a comparable standard when determining whether an error was harmless:

> It would make little sense to adopt the *Winship* standard, which is designed to prevent criminal convictions if there is even a reasonable doubt in the minds of jurors as to the guilt of the person charged, and then on appeal to emasculate that evidentiary standard when the trial court has violated evidentiary rules which might have influenced the jury by creating the reasonable doubt. . .
>
> Saltzburg, *The Harm of Harmless Error*, 59 Va.L.Rev. 988, 992 (1973).

While the *Chapman* rule is commensurate with *Winship*, the outcome determinative test would emasculate the standard of proof at trial by allowing the State to obtain a conviction premised on constitutional error, thereby

shifting the burden of proof to the defendant to demonstrate outcome determinative prejudice in federal court.

In addition to undermining the *Winship* standard of proof, the outcome determinative test is simply inadequate to safeguard the underlying constitutional rights. The adoption of the test proposed by the State would effectively insulate the state court's application of the federal harmless error standard from federal review, except in those isolated cases where the defendant can show the outcome would have been different. As Justice Marshall has noted:

> A limited ability to exercise our certiorari jurisdiction prevents us from effectively policing the nullification of constitutional requirements through the abuse of the harmless error doctrine; nor is it our role to correct such factual errors.
>
> *Briggs* v. *Connecticut*, 447 U.S. 912 (1980) (dissenting from denial of certiorari).

Thus, under the outcome determinative approach, state reviewing courts could avoid the requirements of the Constitution merely by reciting that the error was harmless beyond a reasonable doubt. Since the *Chapman* finding would not be subject to federal review except in rare and extraordinary circumstances, the state appellate judge would not be deterred from focusing his inquiry on the correctness of the result and then holding the error harmless whenever he equated the result with his own predilections.

Consequently, the outcome determinative standard of harmless error review conflicts with the policies underlying the habeas corpus statute. As the Court has stated:

> The provision of federal collateral remedies rests . . . fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.
>
> *Kaufman* v. *United States*, 394 U.S. 217, 226 (1968).

"[T]he threat of habeas serves as the necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Stone* v. *Powell*, 428 U.S. at 520 (Brennan, J. dissenting) quoting *Desist* v. *United States*, 394 U.S. 244, 262-263 (1969) (dissenting opinion). The availability of collateral review assures "that the lower federal and state courts toe the constitutional line." Id. at 521. Therefore, "[i]n effect, habeas jurisdiction is a deterrent to unconstitutional actions by trial and appellate judges, and a safeguard that rights secured under the Constitution and federal laws are not merely honored in the breach." Id. at 521.

For these reasons, it would be fundamentally unfair and judicially unsound to replace the *Chapman* standard with a requirement that the defendant show outcome determinative prejudice on habeas review.

C. The Application Of The *Chapman* Harmless Error Standard On Federal Collateral Review Of State Convictions Comports With The Intent Of Congress As Embodied In 28 U.S.C. § 2254, And Any Modification Of The Harmless Error Standard Is Properly A Legislative Function.

In *Chapman*, the Court held that the final decision of whether a constitutional error is harmless is one of federal law. 386 U.S. at 20-21. Nevertheless, the State argues that the federal harmless error rule should be abandoned on federal habeas corpus review of state convictions. The State's argument ignores the fact that Congress "has selected the federal district courts as precisely the forums that are responsible for determining whether state con-

victions have been secured in accord with federal constitutional law." *Jackson* v. *Virginia*, 443 U.S. at 323.

Under § 2254 of the habeas corpus statute (28 U.S.C. 2241 et. seq.), a federal court must entertain a claim by a state prisoner that he or she is being held in "custody in violation of the Constitution or laws or treaties of the United States." The statute codifies "Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners." *Reed* v. *Ross*, 468 U.S. 1, 10 (1984). In enacting § 2254, "Congress sought to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional actions." *Reed* v. *Ross*, 468 U.S. at 10, quoting *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972).

The State nonetheless argues that due to additional considerations of comity and finality which are present on collateral review, the victim of the constitutional error should be required to show that but for the error, he probably would not have been convicted. However, Congress has been aware of the competing interests cited by the State, but has declined to alter the statute. Specifically, Congress has rejected proposals that would have required a habeas petitioner to establish that but for the constitutional violation, he would probably have been acquitted. *See* Yackle, *Post-Conviction Remedies*, § 101, p. 397 (1981).

This Court is required "to give fair effect to the habeas corpus jurisdiction enacted by Congress." *Brown* v. *Allen*, 344 U.S. 443, 500 (1953) (opinion of Frankfurter, J.) Since Congress has rejected the limitation on habeas review proposed by State, its adoption by this Court would undermine the intent of Congress.

For these reasons, the *Chapman* standard should not be abandoned on habeas review.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed, and the cause remanded with directions to order respondent Miller's release from custody unless the State of Illinois retries him within the 120-day time limit. Ill.Rev.Stat., 1985, Ch. 38, § 103-5.

Respectfully submitted,

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No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES GREER, Warden,
Menard Correctional Center,

Petitioner,

vs.

CHARLES "CHUCK" MILLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

THE HARMLESS ERROR DOCTRINE OF *CHAPMAN v. CALIFORNIA* DOES NOT APPLY TO VIOLATIONS OF THE RULE OF *DOYLE v. OHIO* BECAUSE THE RULE STEMS FROM THE DUE PROCESS CLAUSE, AND CLAIMS OF A DENIAL OF DUE PROCESS ARE SUBJECT TO A GENERAL REQUIREMENT THAT ACTUAL PREJUDICE BE SHOWN.

A. The Definition Of Errors Resulting In A Denial Of Due Process Incorporates A General Requirement That The Defendant Show Actual Prejudice, Thus Making *Chapman* Inapplicable As A Standard Of Review In Due Process Cases.

The thrust of respondent's argument is that the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967) applies on review whenever an error to which a constitutional label has been attached occurs; *Doyle v. Ohio*, 426 U.S. 610 (1976) holds that when the prosecutor attempts to impeach a defendant's trial testimony with evidence of his silence after arrest and receipt of the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), the Due Process Clause is violated; therefore, the *Chapman* standard is the proper one to be applied for violations of the rule of *Doyle*. This syllogistic answer to the question now before the Court is wrong because it fails to take into account the constitutional significance of the terms used.

Due process and harmless error are incompatible concepts. If one were to ask a group of jurists what is meant by the phrase "due process of law", they would doubtless answer that it is a guarantee of fundamental fairness. If one were to ask them what it means to say that an error occurred at the trial of a criminal defen-

dant which served to deprive him of due process, their likely answer would be that it means the defendant was denied a fundamentally fair trial. If one were then to ask them what it means to say that an error occurred which served to deprive the defendant of a fundamentally fair trial and that the error was harmless, they would be at a loss to explain logically the conjunction of those two concepts. The conjunction forms a contradiction, and it cannot be rationalized without stripping the words "fundamental fairness" of their meaning.

Thus, the appropriate standard of review when, as here, the error alleged implicates only the Due Process Clause,[1] is the one which comports with the meaning of due process. If the error involves conduct on the part of government officials which is so reprehensible that no civilized society can tolerate it, as in *Rochin v. California*, 342 U.S. 165 (1952), or if it inherently undermines the process of adjudicating guilt or innocence so that the result cannot be

[1] Respondent makes the argument that the typical *Doyle* scenario, in which the post-*Miranda* silence of the defendant is used to impeach his exculpatory trial testimony, implicates the Fifth Amendment as well as the Due Process Clause. He says that although his decision to testify at trial concededly constitutes a waiver of the Fifth Amendment privilege, the voluntariness of that waiver is vitiated by the breach of the implied promise that his prior silence would not be used against him. (Brief for Respondent at 33) There is no authority for this. By its own terms, *Doyle* rests on the Due Process Clause, not the Fifth Amendment, and this Court has often emphasized that *Doyle* is exclusively a due process case. *Wainwright v. Greenfield*, 106 S.Ct. 634, 638-640 and n.n. 7 and 10 (1986); *Fletcher v. Weir*, 455 U.S. 603, 605-606 (1982) (per curiam); *Anderson v. Charles*, 447 U.S. 404, 407 (1980) (per curiam); *Jenkins v. Anderson*, 447 U.S. 231, 239-240 (1980). As these decisions indicate, *Doyle* condemns the unfairness of inducing silence at the time of arrest and then using it at trial to the defendant's disadvantage. It has nothing to do with unfairly inducing the defendant's trial testimony because there is no clear causal link between the implicit assurance contained in the *Miranda* warnings that silence will carry no penalty and the decision to testify at trial.

relied upon as accurate, as in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), then reversal is always required regardless of whether actual prejudice can be shown. In all other cases, actual prejudice must be shown in order to establish fundamental unfairness. *Holbrook v. Flynn*, 106 S.Ct. 1340, 1348 (1986).[2]

While *Chapman* is clearly the appropriate standard of review when the error alleged implicates certain specific provisions of the Bill of Rights, this Court has never squarely held that it also applies to allegations of error which implicate only the Due Process Clause. Respondent contends that this Court has applied *Chapman* to "identifiable violations of the Fourteenth Amendment," and he cites *Rose v. Clark*, 106 S.Ct. 3101 (1986), *Rushen v. Spain*, 464 U.S. 114 (1983) (per curiam), and *Napue v. Illinois*, 360 U.S. 264 (1959). (Brief for Respondent at 30-31) These cases were distinguished in petitioner's brief at 21-23, n.n. 3 and 4.[3]

[2] While petitioner uses the term "actual prejudice", respondent calls it "outcome determinative prejudice." (Brief for Respondent at 25) The definition of actual prejudice proposed by petitioner is the one formulated in *Strickland v. Washington*, 466 U.S. 668 (1984), which borrowed its terminology from two cases in the due process context, *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) and *United States v. Agurs*, 427 U.S. 97 (1976). In *Strickland*, the Court was careful to point out that the test for prejudice is not an outcome determinative test. *Id.* at 694.

[3] To respondent's list of cases in which *Chapman* was purportedly applied to an alleged violation of due process, *Amici* add *Hopper v. Evans*, 456 U.S. 605 (1982), which they say applies *Chapman* to violations of *Beck v. Alabama*, 447 U.S. 625 (1980). (Brief of *Amicus Curiae* at 14) In *Beck*, the Court struck down a statute precluding the giving of lesser included offense instructions in capital cases, and held that due process requires such instructions be given whenever the evidence would support a verdict of not guilty of the greater offense but guilty of the lesser included offense. In *Evans*, the Court reviewed an alleged violation of *Beck* and found that the evidence did not support the giving of the lesser included offense instruction. 456 U.S. at 613. Evans then argued that the mere existence of the preclusion statute tainted

(Footnote continued on following page)

Finally, respondent argues that while the requirement that actual prejudice be shown is appropriate in cases where ordinarily non-constitutional error is alleged to give rise to a due process violation, as in *Darden v. Wainwright*, 106 S.Ct. 2464 (1986) and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), or in cases where ineffective assistance of counsel is alleged, as in *Strickland, supra*, it is inappropriate for cases like *Doyle*. Actual prejudice must be shown in order to establish constitutional error, he says, in cases where the error itself is not easily identifiable or when the prosecution is not at fault, but it need not be shown where the error is clear and the prosecution responsible. (Brief for Respondent at 30) *Amici* elaborate somewhat on this theme. They distinguish between errors that are difficult to identify and whose effect cannot be gauged without considering the totality of the circumstances, and "specific 'bright-line' violations such as that involved in *Doyle*. . ." (Brief of *Amicus Curiae* at 17) In the former class of cases, actual prejudice is said to be a necessary component of the constitutional analysis because "the initial 'error' . . . may have so many different ramifications that it cannot be considered *constitutional* error until we trace it through its effects at trial." (Brief of *Amicus Curiae* at 19) (Emphasis in original).

This purported distinction, for constitutional purposes, between "bright-line" errors and those not readily identifiable, or between errors for which the prosecution is responsible and those for which it is not, is more apparent than real. Both respondent and *Amici* rely on language

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[3] *continued*
his trial. The Court answered by stating that "[t]he preclusion clause did not prejudice respondent in any way, and a new trial is not warranted. See *Chapman v. California*, 386 U.S. 18 (1967)." 456 U.S. at 613-614. The nature of this citation hardly reflects a considered determination by this Court that the stringent *Chapman* standard must perforce apply to violations of *Beck*.

in *Strickland*, in which the Court noted that the government is not responsible for the errors of defense attorneys, and that such errors come in an infinite variety and are just as likely to be harmless as they are to be prejudicial. 466 U.S. at 693. These observations, however, did not form the principle basis for the requirement that actual prejudice must be shown. Rather, the decision to adopt the two-part test for ineffective assistance claims stems from the recognition that, like the Due Process Clause, the primary function of the Sixth Amendment's Counsel Clause is to ensure the proper functioning of the adversarial process and the fundamental fairness of the trial. 466 U.S. at 684-685. Thus, the prejudice component was included because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance of counsel." 466 U.S. at 691-692. The distinction between errors for which the government is responsible and those for which it is not may have reinforced the decision in *Strickland*, but by itself it is not constitutionally significant. Where the right at stake is the one to due process, the focus of the reviewing court is on "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Even in cases like *Darden*, the virulence and extent of the prosecutor's misconduct did not alter the Court's analysis.

Similarly, the characterization of *Doyle* as creating a "bright-line" rule is not constitutionally significant for purposes of selecting a standard of review. It would have been just as easy to create bright-line rules for any of the instances of misconduct found in *Darden*, because the comments there would never be proper under any circum-

stances. The ease with which errors may be recognized has little to do with the standard under which they are reviewed. It is the nature of the right infringed that determines that choice, and when that right is the one to due process, to a fundamentally fair trial, the defendant must demonstrate actual prejudice in order to show fundamental unfairness.

B. Since *Doyle* Does Not Involve Fifth Amendment Concerns And Does Not Render The Factfinding Process Inherently Unreliable, Respondent Should Be Required To Show Actual Prejudice.

Respondent imputes to petitioner the assertion that this Court's post-*Doyle* decisions effectively overturned *Doyle* (Brief for Respondent at 31); that violations of the rule of *Doyle* are "insignificant infractions" (Brief for Respondent at 32); and that comment on a defendant's post-*Miranda* warnings silence should be allowed. (Brief for Respondent at 33) These allegations are plainly incorrect.

Petitioner does assert that the harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967) does not apply in due process cases, and that allegations of error which are said to result in a denial of due process are treated in one of three ways: if the error involves conduct on the part of government officials which is intolerably reprehensible, or if it inherently undermines the reliability of the adjudication of guilt, then reversal is always required; otherwise, the defendant must show actual prejudice. Petitioner has merely noted that *Doyle* is exclusively a due process case, and its constitutional basis lies not in the lack of probative value of evidence of post-*Miranda* warnings silence, but in the unfairness of first inducing that silence and then later using it to the defendant's disadvantage. Therefore, because *Doyle* is a due process case, and since violations of *Doyle* do not inherently undermine

the adjudication of guilt or involve intolerably reprehensible conduct, actual prejudice must be shown in order to warrant reversal of the conviction.

Respondent makes two contentions regarding the constitutional underpinnings of *Doyle* which are untenable. First, citing *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), he says that *Doyle* violations abridge the right to due process in the most basic way, because by impeaching a defendant with his prior silence, the prosecutor may be penalizing him for exercising his constitutional rights. (Brief for Respondent at 32-33) This was no part of the rationale of *Doyle*, and the theory was specifically rejected in *Jenkins v. Anderson*, 447 U.S. 231 (1980), where the Court held that the use of silence in the absence of *Miranda* warnings for impeachment is permissible even if that silence was explicitly based on invocation of the Fifth Amendment privilege. *Id.* at 235-236 and n. 2. *Hayes* is a decision in the line of vindictive prosecution cases, *see Blackledge v. Perry*, 417 U.S. 21 (1974) and *North Carolina v. Pearce*, 395 U.S. 711 (1969), in which this Court prohibited the practice of bringing more serious charges against a defendant in retaliation for exercising his right to a jury trial or his right to appellate review of his conviction. Due Process does not permit the government to retaliate against a person for exercising a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982). However, as *Jenkins* makes clear, not every cost associated with the exercise of a constitutional right amounts to an impermissible burden on that right. 447 U.S. at 236-238. The doctrine developed in *Pierce*, *Perry*, *Hayes* and *Goodwin* does not insulate a defendant from all adverse consequences which might follow from the exercise of a protected right. It simply prohibits the government from imposing those costs for purely retaliatory motives. *Goodwin*, 457 U.S. at 376-378. That is not what occurs when

the prosecutor impeaches a defendant with his prior silence, even though that silence is a conscious exercise of the Fifth Amendment. *Jenkins*, 447 U.S. at 238.

A second misconception regarding the constitutional basis for *Doyle* is the assertion made by both respondent and *Amici* that *Doyle* prohibits the use of prior silence because it has no probative value. (Brief for Respondent at 33-34; Brief of *Amicus Curiae* at 23-25) Although that was one of the premises of the decision, later cases make clear that it is not grounded in the Due Process Clause. If it was, then prior silence, whether pre-arrest or post-arrest and regardless of whether *Miranda* warnings were given, would always be inadmissible for impeachment purposes. However, *Jenkins* and *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam) permit the use of evidence of prior silence in the absence of *Miranda* warnings. Indeed, *Jenkins* establishes that the subject of the prosecutor's query in this case—respondent's failure to tell the police that he knew Williams and Armstrong committed the murder but that he was not involved—would have been proper if it had focused on the 24-hour period between the time respondent said he learned of the murder and the time of arrest, instead of the post-arrest period.[4]

[4] *Amici* argue that, in addition to having a negative impact on the process of adjudication, *Doyle* violations also undermine the fair administration of justice, and that the government must be bound by the assurances it gives. They cite *Santobello v. New York*, 404 U.S. 257 (1971) (state bound by promise made during plea negotiations not to make sentence recommendation after guilty plea entered) and *Raley v. Ohio*, 360 U.S. 423 (1959) (state may not prosecute for contempt after assuring defendants they could refuse to answer questions on grounds of self-incrimination). In the first place, breaches of promise of the sort involved in these cases always require reversal, and are not subject to harmless error review even under *Chapman*. *Santobello*, 404 U.S. at 262; *Raley*, 360 U.S. at 439-440. Since *Amici* do not urge the same treatment for violations of *Doyle*, the import of their reliance on

(Footnote continued on following page)

Finally, respondent argues the *Chapman* standard should apply on review of violations of the rule of *Doyle* as a matter of policy, because it is the only effective way to discourage prosecutorial misconduct. (Brief for Respondent at 35-37) Discouraging prosecutorial misconduct is not the function of either the harmless error doctrine or the Due Process Clause. *United States v. Hastings*, 461 U.S. 499, 509 (1983) (disciplining prosecutors not the purpose of the harmless error doctrine); *Mabry v. Johnson*, 467 U.S. at 511 ("[t]he Due Process Clause is not a code of ethics for prosecutors"). The selection of a standard of review must be based on the nature of the error alleged and the right infringed. Since *Doyle* is based exclusively on the Due Process Clause, and since violations of *Doyle* do not inherently undermine the process of adjudication, respondent should be required to demonstrate actual prejudice.

II.

THE HARMLESS ERROR RULE OF *CHAPMAN v. CALIFORNIA* SHOULD NOT BE APPLIED IN FEDERAL HABEAS CORPUS PROCEEDINGS, BECAUSE THE INTERESTS WHICH COMPETE WITH THE POLICY OF STRICT ENFORCEMENT OF CONSTITUTIONAL RIGHTS ON COLLATERAL REVIEW OUTWEIGH THE NEED FOR STRICT ENFORCEMENT.

The standard of review applied by this Court on direct appeal where errors of constitutional dimension are involved is that articulated in *Chapman v. California*, 386

[4] *continued*

Santobello and *Raley* is obscure. In the second place, not all governmental assurances are constitutionally binding. *See Moran v. Burbine*, 106 S.Ct. 1135, 1147-1148 (1986) (deliberate deception of suspect's lawyer by police officers concerning their intent not to interrogate in lawyer's absence does not violate due process); *Mabry v. Johnson*, 467 U.S. 504, 509-511 (1984) (state not bound by advantageous plea offer because defendant not induced by offer to plead guilty).

U.S. 18 (1967), and it is "considerably more onerous" than the standard applied to non-constitutional errors. *United States v. Lane*, 106 S.Ct. 725, 730, n. 9 (1986). The reason for this distinction is not that constitutional errors necessarily have a greater impact on the truth-seeking function of the trial, but because constitutional rules serve higher values than do other rules of evidence and procedure. When *Chapman* is applied, values in addition to the need to ensure the fundamental justice of a particular conviction are being served.

By contrast, the central concern of the writ of habeas corpus is narrower in scope. Its purpose is to test the fundamental fairness of an individual judgment by which the State seeks to maintain an individual prisoner in custody. "[F]undamental fairness is the central concern of the writ of habeas corpus", *Strickland v. Washington*, 466 U.S. 668, 697 (1984), and where the focus of the inquiry is on the fundamental fairness of the procedures used, it is appropriate to require the party seeking to overturn the result to demonstrate that he was prejudiced by the error. *See id.* at 691-692 (since the purpose of the right to counsel is "to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding . . . any deficiencies in counsel's performance must be prejudicial" in order to warrant reversal).

Respondent presents three arguments in support of continued application of the *Chapman* standard in habeas corpus cases. First, he says that the costs associated with federal collateral review of state court judgments are minimal, and do not warrant dispensing with a standard of review that serves the full spectrum of constitutional values and not just the need to ensure accurate results fairly arrived at. Second, he says that the harmlessness of constitutional errors is a federal question over which federal review must be maintained in order to ensure that

the state courts are in compliance with constitutional requirements. Third, he says that abandonment of the *Chapman* standard would be contrary to the intent of Congress as expressed in 28 U.S.C. § 2254. For the following reasons, none of these arguments justify the continued application of a standard of review that was designed to comprehensively serve broad interests in a proceeding whose purpose is much narrower.

A. Because Of The Significant Costs It Imposes, Federal Collateral Review Of State Court Convictions Focuses On The Narrow Question Of Fundamental Fairness And Not The Broader Interests Served By The *Chapman* Standard.

Respondent's argument that the costs associated with federal collateral review of state court convictions are insufficient to warrant dispensing with the *Chapman* standard in habeas cases falls on its first premise: that the *Chapman* standard and the writ of habeas corpus share the same concerns. (Brief for Respondent at 40) The cases simply do not support this proposition. It is well-recognized that collateral review of state convictions imposes heavy costs on the criminal justice system—it detracts from finality, frustrates deterrence and rehabilitation, diminishes the significance of the trial as the focal point of the criminal process, and undermines the role of the state courts as the primary line of law enforcement. *Engle v. Isaac*, 456 U.S. 107, 126-128 (1982); *Rose v. Lundy*, 455 U.S. 509, 518-519 (1982); *Sumner v. Mata*, 449 U.S. 539, 550 (1981); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). Accordingly, the Court has emphasized that the principle function of habeas review is to ensure the fundamental fairness of the conviction. *Strickland*, 466 U.S. at 697. At the same time, the Court has recognized that the purpose of harmless error review under *Chapman* is not just to ensure the fundamental fairness of a particular convic-

tion, but to advance respect for the broader societal values reflected in the Constitution as well. *See Rose v. Clark*, 106 S.Ct. 3101, 3111-3112 (1986) (STEVENS, J., concurring in the judgment); *Stanford v. Texas*, 379 U.S. 476, 481-485 (1965). It is because of these additional concerns that *Chapman* establishes a more exacting standard of review for constitutional errors as opposed to non-constitutional errors. However, as *Stone v. Powell*, 428 U.S. 465 (1976) makes clear, those concerns do not play a significant role in habeas review. Despite the important societal values protected by the Fourth Amendment, *see Stanford*, 379 U.S. at 481-482, *Stone* holds that the merits of Fourth Amendment claims, once fairly litigated in state court, may not be reviewed in habeas courts.

Respondent attempts to distinguish *Stone* on the ground that it merely precludes invocation of the exclusionary rule, a judicially created remedy, while he seeks "direct federal habeas protection of his right to a fair trial." (Brief for Respondent at 42) This is not accurate. What respondent seeks to avail himself of in this case is the benefit of a judicially created standard of review, and in this respect he is not unlike the habeas applicant in *Stone*. The *Chapman* standard, like the exclusionary rule, is not mandated by the Constitution, or by the Habeas Corpus Act.

B. Continued Application Of *Chapman* On Collateral Review Is Not Essential To Ensure Compliance With The Constitution By State Courts.

As with his first argument, respondent's second argument falls on its major premise: that unless *Chapman* continues to apply on collateral review, state court harmless error determinations will be insulated from federal scrutiny and the state courts will be free to ignore *Chapman*. (Brief for Respondent at 46-47) There is simply no evidence to document the supposition that state courts do

not enforce federal constitutional guarantees as conscientiously as federal courts do, and considerable evidence to the contrary.

In recent years, there has been a growing trend among state courts to construe their own constitutions as imposing more restrictive standards on police and prosecutors than those required by this Court's decisions construing the federal Constitution. *See, e.g., Federalism And The Rise Of State Courts*, 73 ABA Journal 60, 61-64 (April 1, 1987). Moreover, as the evidence cited by *Amici* confirms—less than 2% of the habeas petitions filed in the 1986 fiscal year ultimately resulted in relief being granted (Brief for *Amicus Curiae* at 37)—state courts are in substantial, indeed nearly perfect, compliance with federal constitutional commands. Respondent's suggestion that this is true only because the threat of habeas forces state courts to comply when they might otherwise be lax (Brief for Respondent at 47) is also undocumented, and eleven years of experience since *Stone* removed Fourth Amendment claims from the ken of habeas does not support the notion.

Amici argue that the standard proposed by petitioner would put a strain on the federal system in general and this Court in particular because the standard proposed does not differentiate between constitutional errors which would be subject to review under *Chapman* on direct appeal, and errors abridging those basic rights for which reversal is always required. (Brief of *Amicus Curiae* at 35-36) This is most emphatically not true. The standard proposed by petitioner would apply only on "collateral review of any constitutional claim *which might be found harmless on direct review. . .*" (Brief for Petitioner at 30) (Emphasis added).

C. The Standard Of Review Proposed By Petitioner Is Not Based On Construction Of 28 U.S.C. § 2254, And Would Not Undermine Congressional Intent.

Both respondent and *Amici* entertain the mistaken belief that the standard of review proposed by petitioner is based on construction of the habeas statute, 28 U.S.C. § 2254, and they argue that the proposal should be rejected because Congress has considered and rebuffed efforts to limit the habeas jurisdiction along these lines. (Brief for Respondent at 48; Brief of *Amicus Curiae* at 26-28) Since § 2254 is not cited in petitioner's brief, it should be clear that the argument is not based on construction of the statute, but rather on setting a standard of review which strikes the appropriate balance between the governmental interests in comity and finality and the habeas applicant's interest in release from a fundamentally unjust incarceration.

Amici make the curious statement that because Congress has enacted a specific statute defining habeas jurisdiction, "[i]t follows that any radical redefinition of the scope of habeas review that would directly diminish the substantive constitutional protections afforded by the law should come from Congress and not from this Court." (Brief of *Amicus Curiae* at 26) The recent history of habeas corpus refutes this. This Court's construction of the jurisdiction conferred by the habeas statute, starting with *Brown v. Allen*, 344 U.S. 443 (1953) and culminating in *Fay v. Noia*, 372 U.S. 391 (1963), teaches that the scope of that jurisdiction is the broadest possible. It extends to all constitutional claims and even encompasses those which have not been exhausted or have been procedurally defaulted. While the Court has never retreated from this interpretation of the scope of the jurisdiction conferred, *see Wainwright v. Sykes*, 433 U.S. at 84; *Francis v. Henderson*, 425 U.S. 536, 538-539 (1976), it has never,

not even in *Fay*, chosen to exercise that jurisdiction to the fullest extent, and every additional limitation imposed since *Fay* has been imposed for equitable reasons, not because Congress amended the statute. Thus, it makes no difference for purposes of the present analysis that Congress has rejected efforts to limit habeas jurisdiction to claims which, if proven, would result in a loss of confidence in the reliability of the result. It is for this Court to decide if that is the appropriate standard, given the costs associated with collateral review and its narrow purpose.

Finally, respondent argues that § 2254 is an expression of Congressional intent to provide a federal forum for the vindication of federal rights, and that since the question of harmless error is a federal one, the habeas court is the proper forum to consider it. (Brief for Respondent at 48) This is the same argument that failed to carry the day in *Stone v. Powell*. It "stem[s] from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights", which lacked empirical support when *Stone* was decided and has gained no currency since. *Id.* at 494, n. 35.

Because the proper focus of federal habeas corpus review is on the justice of the finding of guilt, the appropriate standard of review for errors which might be found harmless on direct appeal is the one which is tailored to the purpose of the proceedings. Accordingly, respondent should be required to demonstrate actual prejudice before habeas relief may be granted.

III.

THE VIOLATION OF THE RULE OF *DOYLE v. OHIO* IN THIS CASE DOES NOT GIVE RISE TO A REASONABLE PROBABILITY THAT, BUT FOR THE ERROR, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

In order for respondent to establish that, had the attempted violation of *Doyle v. Ohio*, 426 U.S. 610 (1976) not occurred, there is a reasonable probability that the outcome would have been different, he must demonstrate that there was some compelling reason for the jury to disbelieve Randy Williams. Otherwise, it cannot be said that the *Doyle* violation was the decisive factor. The timing of the error and the ambiguity of the instruction that immediately followed it, while not wholly irrelevant, are of considerably diminished importance when the appropriate standard of review is applied.

Randy Williams confessed his own involvement in the murder, and in so doing implicated respondent and Butch Armstrong as well, within seven hours of his arrest. At that time, he had no reason at all to falsely accuse respondent. Nevertheless, respondent argues that accomplice testimony is inherently unreliable because it is often motivated by malice toward the accused and promises of leniency. However, while he mentions the undisputed fact that Williams testified pursuant to a plea agreement, he does not deny that the agreement was not reached until three months after the initial accusation and could not possibly have provided a motive for it. As for malice toward the accused, respondent argues that he was a threat to Williams' freedom because Williams had earlier confessed his involvement to respondent. (Brief for Respondent at 21) Respondent's lawyer cross-examined Williams for an entire day, but did not explore this possible motive. Moreover, as a speculative theory, it does not wash. Respondent could not have been more of a threat to Williams' freedom than Williams' own confession. Respondent also argues that by implicating him, Williams exculpated his brother Rick. (Brief for Respondent at 21) It is difficult to see how this could be so. No one has ever disputed that Rick Williams was dropped off at his girlfriend's house before anything was done to the victim, so Randy Williams did not need to exculpate his brother. Furthermore, nothing about Randy Williams' accusation of respondent makes it less likely that Rick Williams was involved.

For these reasons, the judgment of the Court of Appeals awarding respondent a writ of habeas corpus should be reversed.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in petitioner's brief, petitioner requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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April 20, 1987

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No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES GREER, Warden,
Menard Correctional Center,

Petitioner,

—v.—

CHARLES MILLER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ROGER BALDWIN FOUNDATION OF ACLU, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members; the Roger Baldwin Foundation of ACLU, Inc., is its Illinois state affiliate. The ACLU has been particularly active in preserving and defending substantive constitutional rights of criminal defendants. Amici have also been active in preserving the procedural vehicle of federal habeas corpus, which is critical for the protection of such rights. We submit this brief amicus curiae in the hope that it will assist the Court's resolution of this case, which implicates and threatens both these interests.*

* Letters of consent to the filing of this brief have been lodged with the clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, petitioner asks this Court to ignore well-established precedents in all the Circuits that hold that harmless error analysis applies to a violation of Doyle v. Ohio, 426 U.S. 610 (1976) on federal habeas corpus. See Miller v. Greer, 789 F.2d 438, 442-43 (7th Cir. 1985)(en banc). To escape these precedents (as well as this Court's unanimous assumption to the same effect last Term in Wainwright v. Greenfield, 106 S. Ct. 634, 640 n.13 (1986)), id. at 643 (Rehnquist, J., concurring), petitioner proposes a sweeping reexamination of two basic principles which this Court and all other federal courts have routinely applied: (1) Doyle violations, like other "bright-line" constitutional violations in which fairness and truth-seeking values are implicated, are subject to harmless error analysis; (2) harmless error analysis applies to constitutional error on

federal habeas corpus in the same way and to the same extent as on direct review.

Three years ago this Court directly confronted the latter proposition in Strickland v. Washington, 104 S. Ct. 2052 (1984), in which it held that ineffectiveness of counsel claims must be treated the same way on federal habeas corpus, direct appeal or a motion for a new trial. Id. at 2070. Indeed, in no case has this Court, or any of its members, ever even suggested that, in addition to the other procedural and substantive burdens facing a habeas corpus petitioner, he must also meet a standard more stringent than a defendant on direct appeal and show actual prejudice after he has proven constitutional error. In the face of precedents that reject both parts of the argument here, petitioner seeks to combine them together in the hope that two rejections must mean one acceptance or that two times zero will

yield more than zero. Such topsy-turvy mathematics need only be stated to be rejected.

Petitioner's mechanical argument that a Doyle violation is "only" a general due process claim that requires a showing of actual prejudice is wrong as a matter of analysis and wrong as a matter of precedent. Unlike the cases cited by petitioner, Doyle due process violations are complete upon the state's use of post-Miranda silence at trial. Once constitutional error is found, this Court has applied one of two standards of review -- automatic reversal or harmless error. To determine which applies to a particular claim, the Court examines the nature of the right and how the violation of such right relates to other values in the administration of justice, not what label is given to the right.

The actual prejudice standard has been limited to situations in which it is not clear whether a constitutional violation has occurred

unless the effect of the violation on the outcome of the trial is determined. That approach is inapplicable to Doyle violations since Doyle creates a "bright-line" standard for prosecutors to meet. Doyle violations are analagous to other direct misrepresentations by officers of government that have always been subject to the harmless error rule. In addition Doyle violations can seriously undermine the fairness of any proceeding because of the inherently ambiguous nature of a defendant's silence. The Doyle due process violation is not the effect of the violation on the trial's outcome, but rather, the very use of the post-Miranda silence.

Petitioner's second argument that all constitutional violations must be subject to an actual prejudice standard on habeas corpus review would seriously erode constitutional protection under the great writ. Such judicial rewriting of a statute would be improper,

especially in light of Congress' steadfast refusal to modify the statute along the lines urged by petitioner. It would undermine the nature of collateral review in the federal courts in a revolutionary manner. It would effectively strip federal tribunals of their assigned constitutional and statutory function of guarding the constitutional rights of state prisoners and providing federal oversight of state court interpretation of the Constitution. The argument threatens the entire scheme of federal review of constitutional error, under which this Court on direct review of a few cases and the entire federal judiciary on federal habeas corpus review are engaged in a dynamic, on-going dialogue with state courts to define constitutional protections in criminal cases.

Petitioner's argument sets no limit to the constitutional errors that would be subject to the actual prejudice standard, and thus errors that are now subject to the most stringent

standard -- automatic reversal -- because they render a trial fundamentally unfair or because of the importance of the right to other values would be unreviewable and unreversible in the federal courts unless actual prejudice was shown. Such a result would almost certainly retard the elaboration and explication of important constitutional rights.

Adoption of petitioner's approach would inevitably involve this Court in creating exceptions to its own creation, thus needlessly replicating the Court's ongoing efforts to clarify standards of review of constitutional error. In light of Congressional inaction, such an endeavor does not recommend itself as a matter of judicial administration or as a matter of constitutional law.

Finally, petitioner puts forth this radical proposal without any showing of need. The State's interest in federalism and finality are fully served by the statute's current

construction. Moreover, extremely few habeas petitioners currently succeed; the administrative gains to the States would be de minimis; the costs to the federal system and the development of constitutional law would be enormous.

ARGUMENT

I. DOYLE VIOLATIONS SHOULD CONTINUE TO BE SUBJECT TO HARMLESS ERROR ANALYSIS

Last term, this Court engaged in considerable debate over shifting two constitutional violations -- confrontation clause and burden of proof violations -- from the "automatic reversal" category into the "harmless error" category. Ultimately, it determined that these sorts of violations should be reviewed under the harmless error standard. See Rose v. Clark, 106 S. Ct. 3101 (1986); Delaware v. Van Arsdall, 106 S.Ct. 1431 (1986). In this case, petitioner urges a far more radical shift that would require a defendant to

prove "actual prejudice" before obtaining relief after a serious constitutional due process error has been shown. This suggestion is based on a total misreading and distortion of this Court's decisions dealing with the differing standards of review once constitutional error has been found and a fundamental misconception of the nature of the constitutional error that results from a Doyle violation.

A. This Court Has Applied Two Standards of Review to Constitutional Error.

Petitioner's analysis and description of this Court's standard of review of constitutional error divides the standard into rigid subcategories depending on whether the right violated is based on "specific constitutional provisions," Brief of Petitioner at 19, or the "general" provisions of the Due Process Clause. As to the latter, petitioner claims, "actual prejudice" must be

shown before reversal of a criminal conviction is permitted.

In fact, this Court has never adopted an approach based on the "label" of the constitutional right. Rather, the Court has always applied a functional approach involving two separate standards that depend upon the nature of the constitutional error that has been found. See Rose v. Clark, 106 S. Ct. at 3105-07; id. at 3110-12 (Stevens, J., concurring).

First, automatic reversal is required for errors that render a trial fundamentally unfair, such as cases involving a coerced confession, Payne v. Arkansas, 356 U.S. 560 (1958), or cases where counsel was not furnished, Gideon v. Wainwright, 372 U.S. 335 (1963), and cases where important values unrelated to the truth seeking function of the trial are implicated, such as when racial prejudice was present in the selection of grand jurors, Vasquez v. Hillery,

106 S.Ct. 617 (1986), in the disqualification of petit jurors, Batson v. Kentucky, 106 S. Ct. 1712 (1986), or in an appeal to the jury, Miller v. North Carolina, 583 F.2d 701, 708 (4th Cir. 1978);

Second, harmless error analysis applies to almost all other constitutional errors, including many Due Process violations.

"Actual prejudice" is not a separate standard of review of constitutional error in the same sense as the two standards noted above. This Court has used this term, or similar concepts,[1] to describe the showing that a defendant must make to demonstrate that certain kinds of errors rise to a constitutional violation at all. See United States v. Bagley,

1. For purposes of simplicity, amici uses petitioner's term of "actual prejudice." In fact, this Court has used other language in the due process cases upon which petitioner relies. See e.g., Darden v. Wainwright, 106 S.Ct. 2464, 2472 (1986)("so infected the trial with unfairness"); United States v. Bagley, 105 S. Ct. 3375, 3383 (1985) ("reasonable probability ..[of] undermin[ing] confidence in the outcome.")

105 S. Ct. 3375, 3383 (1985); Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). But once it is determined that a constitutional error has occurred in these types of cases, the inquiry ends and the conviction is reversed. As explained below, special reasons relating to these types of errors require a defendant to show probable effect on the outcome before there is even a constitutional error.

Petitioner erroneously describes this "actual prejudice" category as if it were a large, amorphous one applicable to all violations of "general" due process rights, but not to specific constitutional limitations contained in the Fourth, Fifth and Sixth Amendments. That characterization is wrong for at least three reasons.

First, petitioner is wrong in his initial premise that harmless error analysis applies primarily to violations of "specific constitutional provisions" in the Fourth, Fifth

and Sixth Amendments and does not usually apply to "general" due process violations. Rose v. Clark itself, in which a jury instruction shifted the burden of proof to the defendant contrary to Sandstrom v. Montana, 442 U.S. 510 (1979), was a "general" due process case. But this Court in Rose explicitly held that harmless error applied to that type of due process violation. The Court has never suggested that any standard lower than harmless error should be applied to these burden of proof violations. See, e.g., Sandstrom, 442 U.S. at 526-27 (remanding for a determination whether the instruction was harmless error).

Sandstrom adopted a bright line rule that all jury instructions on presumptions that shift the burden to the defendant violate due process. Id. at 524. The fact is that many "general" due process violations like Doyle and Sandstrom develop their own "bright-line" definitions, becoming sub-categories of the due process

clause. The constitutional error is determined independently of its actual effect on the outcome of the trial. Within that area, any violation is subject to precisely the same harmless error test as a violation of the specific provisions of the Fifth and Sixth Amendments. See e.g., Bagley, 105 S. Ct. at 3382, n. 9 (standard of review of due process violations resulting from "knowing use of perjured testimony is equivalent to the Chapman harmless error standard."); Beck v. Alabama, 447 U.S. 625, 633 & n. 14 (1980)(due process violated when state fails to allow jury to consider lesser included offense in capital case when evidence supports such a verdict); Hopper v. Evans, 456 U.S. 605, 613-14 (1982)(Beck violation subject to Chapman harmless error standard).

Second, the "general" due process violations described by petitioner involve errors which do not reach constitutional

dimensions unless and until a prejudicial point is reached, such as the prosecutorial misconduct in Donnelly v. DeChristoforo, 416 U.S. 637 (1974) and Darden v. Wainwright, 106 S. Ct. 2464 (1986), or the use of armed guards in court, as in Holbrook v. Flynn, 106 S. Ct. 1340 (1986).

The same analysis applies with respect to violations under Brady v. Maryland, 373 U.S. 83 (1963). We do not know whether constitutional error has occurred unless we determine the effect of the withheld evidence on the trial; the definition of the right is inexorably linked to the effect of the violation itself. Under Brady and Bagley, supra, the prosecutor is required to produce exculpatory material. But there are numerous ways that evidence may be exculpatory, and it cannot be conclusively shown to be exculpatory unless we trace the possible uses of the material at the trial. The purpose of the Brady rule is to insure the proper functioning of the adversary process at the

trial and to insure that justice is done. See Bagley, 106 S. Ct. at 3380 n.6. Thus, the effect of the prosecutor's failure to produce exculpatory evidence reaches constitutional error only if it undermines the proper functioning of the adversary process to the extent that a court no longer has confidence in the outcome.

At the same time that the Court developed the "prejudice" standard for Brady violations, it recognized that if a prosecutor knowingly uses perjured testimony, the actual effect of the use becomes irrelevant and harmless error rules will apply. See Bagley, 106 S. Ct. at 3382 n. 9. That is true since, as Justice Stevens explained in another context in his concurrence in Rose v. Clark, 106 S. Ct. at 3110-12, the purpose of the rule is not only to protect the truth seeking function of a trial, but to insure that important values in the administration of justice are preserved as well, including the

requirement that prosecutors act fairly in the system. See also Smith v. Murray, 106 S. Ct. 2661, 2672 (1986)(Stevens, J., dissenting)("Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve 'law and justice' should similarly serve those values.") The constitutional error is complete upon the knowing use of the perjured testimony. At that point, the normal harmless error rule comes into play.

Thus, this Court's functional approach has consistently recognized the important difference between specific "bright-line" violations such as that involved in Doyle, in which the constitutional error is complete upon the prosecutor's prohibited conduct, and the errors noted above in which some kind of "effect" on outcome must be shown before a constitutional violation even occurs.

Third, the division petitioner creates between "due process" violations in which prejudice must be shown and specific constitutional violations under the Fifth or Sixth Amendments where harmless error applies is wrong even in terms of the cases petitioner cites. Thus, in Strickland -- a Sixth Amendment and therefore a "specific Constitutional provision" case, see Strickland, 104 S. Ct. at 2064 -- this Court noted that a "bright-line" automatic reversal or harmless error rule applies in some instances, such as when a conflict of interest or government interference with counsel occurs, see id. at 2067. However, when the court examines counsel's professional errors in judgment, since there are so many ways that a lawyer may err, he is not considered constitutionally ineffective unless we determine, first, how far he has performed below the Plimsoll line of reasonably competent counsel, and second, what effect his

incompetence has had upon the trial. Only when both of these determinations are made, can we say that a Sixth Amendment error has occurred.

In short, the Court's approach has been a functional one, not the mere examination of constitutional labels. The "actual prejudice" standard applies when the initial "error," such as failure to meet minimum standards of professional competence or failure to produce exculpatory material, may have so many different ramifications that it cannot be considered constitutional error until we trace through its effects at the trial. Thus, a defendant must show actual prejudice from the error -- that it did effect his right to a fair trial, either under the due process clause or the Sixth Amendment -- by undermining the proper functioning of the adversarial process. That approach simply is irrelevant to a Doyle violation, which is constitutionally complete when the error is made.

B. Under Doyle, Use of Post-Miranda Silence Violates Due Process without Regard to the Trial's Outcome.

Doyle violations undermine the fundamental fairness of the adversary process and implicate the truth-seeking function of the criminal trial. Because of the interests protected by the Doyle rule, whether the use of post-Miranda silence "actually prejudiced" the defendant is irrelevant for due process purposes. Since the harmless error rule typically applies to the interests protected by Doyle, it should continue to be applied in this case.

1. A Doyle Violation, Without More, Undermines the Fair Administration of Justice.

At a minimum, the Miranda warning is an assurance that the State will not use the defendant's silence against him in any way: "... the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized." Wainwright v. Greenfield, 106 S. Ct.

634, 639 (1986). The State's use of that silence at the trial to impeach the defendant after assuring him that he has the right to remain silent is "fundamentally unfair," as this Court has consistently repeated. See Fletcher v. Weir, 455 U.S. 603, 606 (1982). Therefore, when the prosecutor introduces the defendant's silence against him, the due process violation is complete.

Even if the silence were probative in some way, the State may not benefit by breaching its promise. The State, as the sovereign, must keep its word. It cannot convict a citizen by violating specific assurances given him at a prior time. See, e.g., Raley v. State of Ohio, 360 U.S. 423, 438 (1959)(state may not convict a person "for exercising a privilege which the State clearly had told him was available to him."); cf. Santobello v. New York, 404 U.S. 257, 262 (1971) (state bound by its plea bargains entered on the court record).

Thus, even if the Doyle rule had no truth-seeking purpose, it serves important interests in the administration of justice by requiring the State to keep its promises. It surely is not appropriate to permit the State to violate its assurances to its citizens unless the defendant can show that he suffered actual prejudice from such breaches.

Doyle provides prosecutors and courts with a clear rule that can be easily followed. Petitioner puts forth no credible reasons for its attempt to muddy that standard. Doyle violations are rarely inadvertent, heat-of-combat mistakes by prosecutors, unlike those that can be made during argument. See, e.g., Darden, supra. In this case, for example, the prosecutor deliberately began his cross-examination of defendant with his post-arrest silence. Moreover, because the breach of the State's promise to the defendant is "fundamentally unfair," it is a due process

violation. A fact-based inquiry into the effect of the violation on the course of the trial is irrelevant to the constitutional determination. Petitioner's attempt to equate Doyle violations with ineffective assistance of counsel or "fair trial" violations simply misses the point of the nature of the Doyle due process violation.

2. Post-Miranda Silence is "Insolubly Ambiguous."

This Court in Doyle indicated why it was necessary to establish a clear constitutional rule forbidding the use of a defendant's silence to impeach him after he received Miranda warnings:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. 426 U.S. at 417.

Under these circumstances, a defendant's silence has little, if any, probative significance. It is both unreliable and

suspect, given the state's role in securing that silence.

Furthermore, a jury is likely to give undue weight to such silence if stressed by the prosecutor on cross-examination and on summation. In the same way that an alleged confession is devastating evidence in a criminal trial and therefore any use of an involuntary confession requires automatic reversal, see Payne v. Arkansas, 356 U.S. 560 (1958), use of ambiguous silence before the jury has such an undesirable impact that it is difficult, if not impossible, to weigh its effect. Permitting the prosecutor to cross examine a defendant on his silence or argue that the silence has any significance would confuse the jury and upset its truth seeking function in a fundamental manner. Thus, like other errors that upset the truth-seeking function without automatically rendering the verdict suspect, harmless error is

the appropriate standard for Doyle violations. See Rose v. Clark, 106 S. Ct. at 3105-07.

II. NEITHER THE HABEAS CORPUS STATUTE NOR THE NATURE OF HABEAS CORPUS JUSTIFIES A REQUIREMENT OF ACTUAL PREJUDICE AFTER CONSTITUTIONAL ERROR IS SHOWN.

Petitioner's second point deals not with the constitutional right asserted, but with the stage at which the constitutional violation is found. Petitioner starts with the proposition that this Court has already placed upon habeas petitioners some additional burdens that do not apply on direct review, e.g. default and exhaustion requirements, retroactivity determinations, and then argues, in effect, that for reasons of federalism and finality, this Court should judicially amend the habeas corpus statute and make it still more difficult for a state prisoner to succeed on habeas corpus.

But there is nothing in the habeas corpus statute or in this Court's decisions interpreting it that suggests a generalized need

to increase the burdens that a state prisoner must bear after he has shown constitutional error, as if he were a high jumper who must leap over a progressively higher bar each time he is unsuccessful on a prior jump. The habeas corpus statute, as interpreted by this Court, fully accounts for the State's interests in federalism and finality.

A. The Court Should Interpret the Habeas Statute In Light of Congressional Intent and the Purposes of Habeas Corpus Review.

We start with the obvious proposition that a specific statute and specific rules passed by Congress define the federal courts' habeas corpus jurisdiction. It follows that any radical redefinition of the scope of habeas review that would directly diminish the substantive constitutional protections afforded by the law should come from Congress and not from this Court.

Indeed, Congress could not possibly have intended that the habeas corpus statute should

be construed in the manner that petitioner suggests. Over the past four years Congress has had before it a number of proposals to restrict habeas corpus jurisdiction, some of which sought to accomplish the same goals as the petitioner. See S. 238, 99th Cong. 1st Sess. (1985) and S. 238, Habeas Corpus Reform, Hearings before the Sen. Judiciary Comm., 99th Cong., 1st Sess. (1985). Congress refused to enact any part of that provision or similar bills introduced earlier and described in the hearings. Under well-established canons of statutory construction, this Court should not adopt a new construction of a statute when Congress has explicitly rejected the suggested revision. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975)(SEC-proposed amendment rejected by Congress; Court refuses to interpret statute along lines of rejected amendment).

The habeas corpus statute specifically grants jurisdiction in the federal courts in all

cases in which the petitioner claims he has been detained "in violation of the Constitution or laws ... of the United States." 28 U.S.C. Sect. 2241(c)(3). Likewise, this Court's appellate jurisdiction over state criminal trials is based upon the assertion of a "right, privilege or immunity ... specially set up or claimed under the Constitution." 28 U.S.C. Sect. 1257(3). On the face of the statutes, review of substantive constitutional rights are protected to the same extent under both provisions.

This Court has consistently noted the dual systems that have been established to insure that constitutional rights in the criminal justice system are fully protected, with the habeas corpus statute an "additional safeguard" in this regard. Stone v. Powell, 428 U.S. 465, 491 n.31 (1976). See also Kuhlmann v. Wilson, 106 S. Ct. 2616, 2623 (1986) (describing the extension of federal habeas corpus jurisdiction to include review of all constitutional errors,

until it became substantially coextensive with direct review by this Court). Congress adopted this expansion of habeas corpus review, amending the statute to conform to this Court's interpretation of the law. See Kuhlmann, 106 S. Ct at 2634 (Brennan, J. dissenting).

Thus, the entire federal judiciary took on the function and responsibility of enforcing constitutional safeguards in the state court criminal justice systems, with this Court reviewing a few cases each term on direct review and the district courts available -- in accordance with their statutory mandate -- to assume jurisdiction over the thousands of cases that this Court could not review on direct appeal.

Under this scheme and this Court's current interpretation of the statute, interests of federalism and finality are fully served. For example, the constitutional question must be first presented to the state courts for their

consideration, and review must be fully exhausted. Any fact finding made by the states courts, including the state appellate courts, must be accepted by the federal courts. Claims that are procedurally defaulted in the state courts can be brought in the federal courts only upon a showing of "cause" and "prejudice." Claims that illegally seized evidence have been improperly introduced at trial will not be heard by the federal courts if fully litigable in the state courts.

Once the prisoner has complied with these requirements, the state's interests have been fulfilled, and habeas corpus review should then be available as a safety net to catch those few claims "of 'disregard of the constitutional rights of the accused...where the writ is the only effective means of preserving his rights.'" Kuhlmann v. Wilson, 106 S. Ct. 2616, 2623 (1986) (quoting Waley v. Johnson, 316 U.S. 101, 104-05 (1942)). Given the state's wholly adequate

opportunity to protect a defendant's constitutional rights, it lacks any cognizable interest in having federal court review made under a lesser standard than the state applied in its initial review.

Viewed from another perspective, the federal courts perform what Justice Harlan called "a quasi-appellate review function, forcing both trial and appellate courts in both the federal and state system to toe the constitutional line." Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., concurring)(emphasis added). However, the "continued availability of a mechanism for relief" from constitutional error, Kaufman v. United States, 394 U.S. 217, 226 (1969), would be seriously undermined if the standard of review was changed in the manner suggested by petitioner. The on-going dialogue between the state and federal courts on the meaning and definition of the Bill of Rights would be

seriously interrupted and distorted. In effect, state and federal courts would no longer be speaking the same language. Federal courts reviewing cases for constitutional error would no longer be viewing the case from the same perspective and under the same standards as the state courts.

Federal courts might also find it easier to reach the "actual prejudice" standard first before deciding whether constitutional error had occurred -- in effect, deciding that even if error were found, it would not have been prejudicial -- and thus never reach the substantive issues. Indeed, such an approach would also be consistent with traditional canons of constitutional adjudication. In Strickland, 104 S. Ct. at 2069-70, this Court suggested such an approach would be appropriate. The entire "quasi-appellate" procedure would become distorted in a manner that Congress could not possibly have intended. And an important guide

to the state courts in constitutional adjudication would be largely eliminated.

That approach would entail heavy constitutional costs. This Court can take judicial notice of the fact that some serious constitutional violations are not caught on their first review through the state court system or on direct review. The alternate route of habeas corpus is statutorily required to catch such cases the second time around. Certainly, petitioner's approach does nothing to encourage more careful state court consideration of constitutional claims.

Furthermore, it should be noted that cases establishing some of the most important constitutional rights over the past decades have found their way to this Court through federal habeas. See e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980); Rose v. Mitchell, 443 U.S. 545 (1979); Crist v. Bretz, 437 U.S. 28 (1978). If federal courts routinely reviewed cases for

actual prejudice prior to an examination of constitutional claims, establishment of important constitutional rights could be delayed, if not indefintely postponed. See e.g., Vasquez v. Hillery, 106 S. Ct. 617 (1986).

It would surely be a significant strain on this Court and a loss to our federal system if additional substantive burdens were placed on habeas petitioners in a manner that would jeopardize plenary review of their claims in federal court. Petitioner's "actual prejudice" standard is a significant shift away from the purpose of habeas corpus as defined both by Congress and by this Court -- determining whether a prisoner's constitutional rights have been violated. It is a giant step toward reserving the writ only for those who can show factual innocence -- a step this Court and Congress has consistently rejected.

B. The Actual Prejudice Standard Would Impose Significant Costs on the Federal System.

The petitioner's standard would place substantial costs on the current structure of criminal justice review. But the State presents no countervailing interests that would justify this radical change.

The proposal proffers no limitations as to the type of constitutional right to which the "actual prejudice" standard would apply. It would apply to rights where automatic reversal would now be required. Even blatant violations of the most basic and fundamental rights -- right to counsel, right to an unbiased judge, right against use of coerced confessions, right against racial discrimination in the selection of grand and petit juries -- would not result in reversal on habeas corpus unless actual prejudice were shown. In other words, the proposal treats all rights, including those that are fundamental to a fair trial or to our

notions of justice, the same way, at the least rigorous end of the review spectrum.

If the Court, after adopting the "actual prejudice" standard felt compelled to create exceptions for some fundamental rights on habeas corpus, it would turn the habeas corpus statute on its head. In the face of the Congressional command to insure that no person be imprisoned "in violation of the Constitution," this Court would be forced to start a new process of weighing different rights in the habeas context, under standards of its own creation.

Petitioner makes absolutely no showing of any need for its proposal. Petitioner appears to be motivated by a generalized desire to make it more difficult for a state prisoner to succeed in a habeas proceeding. In view of the substantial accommodation to the State's interest already required prior to habeas review -- exhaustion, procedural default, preclusion of claims of use of illegally seized evidence,

presumption of correctness to state fact finding, colorable innocence for resubmitted claims -- those prisoners whose constitutional rights have in fact been violated should not be denied relief under the currently applicable standards of review. These standards impose no significant burdens on the States. Less than 2% of the submitted petitions are successful (in only 1.95% of the petitions determined in fiscal year 1986 was judgment rendered for the prisoner, according to figures supplied by the Administrative Office of the U.S. Courts). Before the Court acts to radically alter the nature of habeas corpus review, the Petitioner should be required to demonstrate the necessity of such a change, See e.g., Stone v. Powell, 428 U.S. at 492 . Given the current minimal success rates of habeas petitioners, the actual prejudice requirement is totally unnecessary.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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